5 of the act of June 29, 1906, 34 Stat., 584, 592, for expediting the suit in equity pending in your court, entitled The Delaware, Lackawanna & Western Railroad Company, complainant, vs. The Interstate Commerce Commission and Rahway Valley Railroad Company, defendants, brought to enjoin and set aside an order of the Interstate Commerce Commission.

Will you kindly file this certificate in said suit?

Respectfully,

CHARLES J. BONAPARTE,
*Attorney General.*

Inc. 3729.

37 In the Circuit Court of the United States, within and for the Southern District of the State of New York.

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| THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, complainant, *vs.* INTERSTATE COMMERCE COMMISSION AND RAHWAY VALLEY RAILROAD COMPANY, defendants. | In equity. No. 3-84. |

I hereby certify that, in my opinion, the above entitled case is of general public importance, and request that it be given precedence over others and in every way expedited, in accordance with the provisions of the act of February 11, 1903 (32 Stat., 823), and of the act of June 29, 1906 (34 Stat., 823).

CHARLES J. BONAPARTE,
*Attorney General.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Aug. 19, 1908. John A. Shields, Clerk.

38 United States Circuit Court, Southern District of New York.

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| DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *vs.* RAHWAY VALLEY RAILWAY COMPANY AND INTERSTATE COMMERCE COMMISSION. | In equity. |

*To John A. Shields, Clerk of the United States Circuit Court, Southern District of New York:*

You will please enter my appearance as solicitor for the defendant Interstate Commerce Commission in the above entitled action.

Dated New York, September 7th, 1908.

HENRY L. STIMSON,
*United States Attorney, and Solicitor for the Defendant Interstate Commerce Commission.*

(United States Court & Post Office Building, New York City.)

(Endorsed:) U. S. Circuit Court, Southern District of New York. Delaware, Lackawanna & Western Railroad Company vs. Rahway Valley Railroad Company and Interstate Commerce Commission.

Notice of appearance. Henry L. Stimson, United States attorne attorney for I. C. C. U. S. Circuit Court, Southern District of N. Y Filed Sep. 7, 1908. John A. Shields, Clerk.

39 Circuit Court of the United States for the Southern District New York.

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| THE DELAWARE, LACKAWANNA & WESTERN RAILROAD Company, complainant, *vs.* INTERSTATE COMMERCE COMMISSION AND RAHWAY Valley Railroad Company, defendants. | In equity. |

Please take notice that I have been retained and appear herein fo the Rahway Valley Railroad Company, one of the defendants in th above-entitled suit, and hereby demand that copies of all paper her in be served upon me at my office, No. 5 Nassau street, Borough of Manhattan, city of New York.

Dated September 11th, 1908.

Yours, &c.,

CHARLES A. COLLIN,

*Solicitor for the defendant Rahway Valley Railroad Company.*

(Office and post office address: 5 Nassau street, Borough of Manhattan, New York City.)

To JOHN L. SEAGER, Esq., *Solicitor for Complainant.*

W. S. JENNEY, Esq., *Of Counsel.*

To INTERSTATE COMMERCE COMMISSION,

*Washington, D. C.*

40 (Endorsed:) Circuit Court of the United States for th Southern District of New York. The Delaware, Lackawann & Western Railroad Company, complainant, against Interstate Com merce Commission and Rahway Valley Railroad Company, defend ants. Notice of appearance. Charles A. Collin, solicitor for Rahwa Valley Railroad Company, 5 Nassau st., New York City. U. S Circuit Court, Southern District N. Y. Filed Sep. 11, 1908. John A. Shields, Clerk.

41 In the Circuit Court of the United States for the Souther District of New York.

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| DELAWARE, LACKAWANNA AND WESTERN RAILROAD Company, complainant, *vs.* THE INTERSTATE COMMERCE COMMISSION AND RAHWAY Valley Railroad Company, defendants. | In equity. |

*To the Judges of the Circuit Court for the Southern District of New York:*

The answer of the Rahway Railroad Company, one of the defend ants to the bill of complaint of the Delaware, Lackawanna and West ern Railroad Company, the above-named complainant:

1. This defendant admits the allegations contained in Paragraph I of said complaint.

2. This defendant admits the allegations contained in Paragraph II of said complaint.

3. This defendant admits all of the allegations contained in Paragraph III of said complaint, with the exception of the allegation that its principal place of business is at Summit, New Jersey, which is denied by this defendant; this defendant alleging that its principal place of business is at Kenilworth, New Jersey.

4. This defendant admits the allegations in Paragraph IV of complainant's bill, wherein it is alleged that it has been for many years and now is operating the Morris and Essex Railroad under a lease in perpetuity; and it also admits the allegations therein contained relating to the general direction of the said railroad and branches; that the main line of said Morris and Essex Railroad does lie in about the manner, with an additional or third track through the city of Newark, between Highland avenue, the first station west of Newark, and Millburn and through the city of Newark to the junction with the Passaic and Delaware branch; that it enters the city of Hoboken from the west by means of a double tracked tunnel, five-fifths of a mile long, through Bergen Hill, and that the distances stated between the various stations is correct with the exception of the distance from Summit to Gladstone, which is alleged to be twenty-one miles and which this defendant alleges to be incorrect.

And this defendant further answering says that the territory through which said Morris and Essex Railroad extends, including the city of Newark and west thereof towards Summit, to and including South Orange, is closely built up with the exception of the salt meadows, extending from Bergen Junction to Harrison, a distance of six and one half miles; that from South Orange to Morristown, a distance of sixteen miles, with the exception of the city of Summit there is no extensive development and just to characterize the territory as being practically an unbroken city warrants the assertion that the allegation is made either through bad faith or lack of knowledge of the territory, as the contention is absolutely unwarranted; and that of the entire territory there not contain over thirty thousand inhabitants. The increase in population in said territory during the past ten years has not exceeded twenty per cent, nor has said increase been gradually marked during the past three years. The territory on the Passaic and Delaware branch, extending from Summit to Gladstone, a distance of twenty three miles, is an undeveloped farming section, with the exception of Bernardsville, a small hamlet, in the neighborhood of which a few gentlemen of wealth have their country places; the business of this branch being confined to a single train.

This defendant further answering says that all interstate freight coming from shippers on the line of the defendant company would be destined to points west of Newark, and in consequence thereof would be carried through the territory within which there is little develop-

ment and where the opportunity for carrying, without interference with traffic, is to be found during numerous periods daily; that
43 freight coming to defendant's line could be carried through the zone territory, and that any freight that might be offered through defendant company's line coming from other lines with which it connects and destined to points in complainant company's territory, and to the alleged congested zone, would supply a demand that would otherwise occasion a longer haul over complainant's line if the connection were not made.

This defendant further answering says that it believes it to be true that the complainant company has expended the sum of four million dollars within the past five years, but as to how and when the said expenditures have been made this defendant demands proof; but this defendant alleges that the greater portion of said amount has been expended in building a new terminal at Hoboken and in the acquisition of land and the construction of a ferry house at Twenty-third street in the city of New York, and that a large proportion of these expenditures were made necessary by the destruction of all terminals by fire; that the expenditures at Newark and Summit were made only after the municipalities had made large contributions towards the expense thereof, in order to eliminate grade crossings, which had cost scores of lives; that from the city of Newark to Highland avenue, a distance of three and two-tenths miles, it is admitted that the complainant company is confronted during the rush hours with congestion of traffic and that delays are often occasioned, but it is alleged by this defendant that this condition has existed for more than ten years; that the said section is closely built up and practically a city; that there are more than 25 dangerous grade crossings between said points and that the main trackage between said points is insufficient and has been insufficient for years to properly care for the business during the morning and evening rush hours; and this defendant alleges that the said complainant has contended that it would not make other provision for its traffic, or take any steps to eliminate said dangerous grade crossings, unless the city of Orange contributed largely towards the improvement, the complainant company contending that it made no difference to them.

This defendant further answering says that all the other large railroads in the territory adjoining New York have provided at least double the track facilities of the complainant company and have expended sums of money in the development of their property and in meeting the requirements of their traffic, which make the expenditures of the complainant company appear insignificant and pitiful; that for a long time the aforesaid other roads, having a traffic
44 comparable with that of the complainant company, have provided four regular tracks, with additional sidings in the nature of the so-called third track of the complainant's road.

This defendant further answering says that there are periods each day of sufficient length to enable the complainant company to properly move any freight that might be offered by the defendant com-

pany, without inconvenience to the traffic of the complainant company's road, and that if the third track, which the complainant alleges it intends to extend, is ever built, additional opportunity will be provided for the transportation of freight.

This defendant further answering denies that the aforesaid Morris and Essex territory is entirely of a residential character and alleges that a large amount of freight originates in said territory; that the complainant company has many sidings connecting industries along the line of its road and that it is soliciting freight from shippers in said territory.

This defendant further answering says that it denies that all freight originating on the Passaic and Delaware branch destined to the East is handled west to Denville, or that freight originating on the said Morris and Essex road between Summit and Denville and destined to Summit and to points east of Summit is handled west and then via Boonton branch to points east of Summit. This defendant also denies that west of Summit, against west bound traffic, there is a grade of sixty-five feet to the mile between Chatham and Madison.

This defendant further answering says that it admits that the complainant company has diverted freight traffic and is endeavoring to divert freight traffic from the Morris and Essex division to its so-called Boonton branch, but denies that the aforesaid traffic is diverted for the reasons alleged by complainant; this defendant alleging that the diversion of traffic to said Boonton branch is done for the purpose of depriving the Morris and Essex division, the leased line, of profitable business, the rental of said line being dependent upon the earnings thereof.

5. This defendant admits the allegations contained in Paragraph V of complainant's bill, except so far as they refer to rate and to freight handled over the line of this defendant company and the destination thereof.

This defendant further answering says that during the past year shippers on its line have made shipments of freight to exclusive points on the line of the complainant company and in the absence of the connection have been compelled to pay a combination of local rates; that carload freight is originating at the present time on the line of the defendant company destined to exclusive points on the line of the complainant company and that in consequence of the connection being refused serious delays are occasioned and unnecessary expense is incurred.

This defendant further answering says that the interstate traffic in and out of Kenilworth for the past year has been in excess of four hundred cars and that a large amount of interstate freight is handled outside of Kenilworth.

6. This defendant further answering denies the allegations contained in Paragraph VI of the complaint, except so far as the same relates to the proceedings before the Interstate Commerce Commission and the explanation of Exhibit A attached to complainant's bill.

This defendant further answering says that the track in yellow shown in Exhibit A attached to complainant's bill, together with the two adjoining tracks in yellow, are only used for a short period each day and that very seldom does an occasion arise when more than one of said tracks is in use at one time; that the alleged use of said tracks for siding purposes by Passaic and Delaware trains consists in the occasional use for a short period of one of the tracks for a combination baggage and smoking car; the said car being usually placed in the freight yard.

This defendant further answering says that in the year nineteen hundred and four the Rahway Valley Railroad Company was incorporated for the purpose of constructing a railroad to extend from Kenilworth through the town of Springfield to Summit and connecting there with the line of the complainant company; that the project was undertaken and the said road constructed upon the understanding of the persons connected therewith that a connection would be given with the road of the complainant. At the time the project was entered into manufacturing concerns located at Kenilworth urged the construction of the road, in order that they might thereby obtain a more direct route to the west over the line of the complainant company. The town of Springfield, having a population of twelve hundred inhabitants and distant three miles from Summit, urged the construction of the road, as it had no railroad facilities. Coal and lumber dealers at Summit, who had been deprived of switch connections by the complainant company, also urged the construction of the road, in order that they might thereby be provided with proper
46 facilities for carrying on business. Owners of stone quarries and other shippers in the territory of complainant company, having no facilities for proper shipment, also urged the construction of the road. All of the foregoing interests demand the connection.

7. This defendant further answering denies the allegation contained in Paragraph VII of complainant's bill and avers that the said Interstate Commerce Commission had the power and jurisdiction to make the order complained of in complainant's bill of complaint; that said Rahway Valley Railroad Company is a "shipper" within the intent and meaning of section one of the act to regulate commerce, as amended, and that the said road is a "lateral, branch line of railroad" within the intent and meaning of said act, and that shippers of interstate freight located on the line of the defendant company made application to the complainant company for a physical connection between the line of complainant's road and the road of this defendant at Summit on October 8, 1905, and that a reply to said application was made by said complainant company on December seventh, nineteen hundred and six. And this defendant further answering says that it was the intent of Congress in use of the words "lateral, branch line of railroad" to include such a railroad as is this defendant's; and that it was the intent of Congress in the enactment of section one of the act to regulate commerce, as amended, to enable such a railroad as is defendant's road,

on its own initiative and application, to force a physical connection with another main line railroad upon the conditions in said act imposed.

And this defendant further answering says that said connection as ordered can be made and operated with safety; that the same is practicable; and that it will furnish sufficient business to justify the construction and maintenance thereof.

And the defendant prays the same advantage of the aforesaid answer, as if it had pleaded the several matters and things aforesaid where a plea would have been proper, or as if on account thereof it had demurred to said bill or part or parts thereof where a demurrer would have been proper; without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable
47 court shall direct, and humbly prays to be hence dismissed with its reasonable costs and disbursements in this behalf most wrongfully sustained.

[SEAL.] RAILWAY VALLEY RAILROAD COMPANY,
By WM. W. COLE, *President*.

CHARLES A. CELLS,
*Solicitor for Defendant Railway Valley Railroad Company.*
(Office and post-office address, No. 5 Nassau street,
Borough of Manhattan, city of New York.)

E. L. MCKIRGAN, *Of Counsel*.

SOUTHERN DISTRICT OF NEW YORK,
*City and County of New York, ss:*

William W. Cole, being duly sworn, deposes and says:

I am an officer, to wit, the president of the defendant corporation named in the foregoing answer. I have read the foregoing answer, and of my own knowledge find it true except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

WM. W. COLE, *President*.

Subscribed to and sworn to before me this 5th day of October, 1908.
[SEAL.] E. G. THOMPSON,
*Notary Public, Richmond County*.

Cert. filed in New York County.

(Endorsed:) In the Circuit Court of the United States for the Southern District of New York. In equity. The Delaware, Lackawanna and Western Railroad Company, Complainant, vs. Interstate Commerce *Commission* Commission and Railway Valley Railroad

Company, defendants. Answer of the Rahway Valley Railroad Company. Chas. A. Collin, solicitor for defendant Rahway Valley Railroad Co. E. L. McKirgan, of counsel. U. S. Circuit Court, southern district, N. Y., filed Oct. 10, 1908. John A. Shields, clerk.

48 In the Circuit Court of the United States for the Southern District of New York.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, COMPLAINANT,

*vs.*

INTERSTATE COMMERCE COMMISSION AND RAHWAY VALLEY RAILWAY COMPANY, DEFENDANTS.

DEMURRER.

The demurrer of the Interstate Commerce Commission, one of the defendants above named, to the bill of complaint of the Delaware, Lackawanna Railroad Company, the above-named complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in said complainant's bill to be true in manner and form therein stated, set forth, and alleged, files this its demurrer; and for cause of demurrer shows that said complainant has not, as appears by said bill, made out any title to the relief therein prayed.

The defendant specially demurs to complainant's bill, and assigns as such grounds of demurrer:

I. That it appears from the face of said bill that all of the proceedings required by statute to be taken were duly taken and had; that after a formal complaint and answer a full hearing was had; and that the commission arrived at its conclusion after being fully advised; that the order complained of was duly given, made, rendered, and served; and that the conclusion of said commission
49 was not arbitrary, or reached through fraud; and, therefore, the act of the said commission is final and conclusive and not reviewable by the courts.

II. That said bill does not set forth any act or circumstances showing fraud or arbitrary action on the part of the commission, and if it be claimed that the act of the commission was in any way irregular or arbitrary the same is not set forth in the said bill of complaint.

III. That said bill of complaint fails to state any fact or facts from which the court can determine from the face of the bill of complaint that the switch connection ordered by this defendant is not reasonably practicable and can not be put in with safety and will not furnish sufficient business to justify the construction and maintenance of the same.

IV. That each and every portion of the bill of complaint which charges and avers that this defendant has not the power or jurisdiction to make said order of June 24, 1908, does not state any ground for equitable relief.

V. That the bill is indefinite, vague, uncertain, and ambiguous in that it states merely the conclusion of the pleader and does not allege any definite ultimate facts from which the court can determine that the order made by this defendant is not in accordance with the statute and the Constitution.

VI. That it appears from the bill and from the report and order of the commission attached thereto that the order complained of was regularly made, is a lawful order, and does not deprive complainant of any right under the statute or the Constitution of the United States.

VII. Wherefore, and for divers other good causes of demur-
50 rer appearing in said bill, this defendant demurs thereto and humbly demands the judgment of this court whether it shall be compelled to make any other or further answer to said bill, and prays to be instantly dismissed, with its costs and charges in this behalf most wrongfully sustained.

[SEAL.] LUTHER WALTER,
*Solicitor for Interstate Commerce Commission.*
By EDW. A. MOSELEY,
*Secretary.*
HENRY L. STIMSON,
*United States Attorney,*
*Solicitor for Deft. I. C. C., of counsel.*

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Edward A. Moseley makes solemn oath and says: That he is the secretary for the above-named defendant, the Interstate Commerce Commission, and that the above demurrer is not interposed for delay, but that the same is true in point of fact.

EDWARD A. MOSELEY.

Sworn and subscribed to before me, H. S. Milstead, a notary public in and for the said District of Columbia, this 19th day of October, 1908.

[SEAL.] H. S. MILSTEAD, *Notary Public.*

I hereby certify that the foregoing demurrer is well founded in point of law.

HENRY L. STIMSON,
*United States Attorney,*
*Solicitor for Defendant I. C. C.*

51 (Endorsed:) U. S. Circuit Court, Southern District of New York. Delaware, Lackawanna & Western Railway Company, complainant, versus Interstate Commerce Commission and Rahway

Valley Railway Company, defendant. Demurrer. Henry L. Stimson, United States Attorney, solicitor for deft. I. C. C. U. S. Circuit Court, Southern District of N. Y., filed Oct. 20, 1908, John A. Shields, clerk.

52 In the Circuit Court of the United States for the Southern District of New York.

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| DELAWARE, LACKAWANNA AND Western Railroad Company, complainant, vs. THE INTERSTATE COMMERCE Commission and Rahway Valley Railroad Company, defendants. | In equity. June term, 1908. No. |

SIRS: You will please take notice that upon the bill of complaint filed herein on the 7th day of August, 1908, the affidavits of Lincoln Bush, Joseph G. Sickles, and John L. Seager, each verified the 7th day of August, 1908, with copies of which said papers you are herewith served, upon the stenographer's minutes of the testimony taken and proceedings had before the Inter-state Commerce Commission on April 2d and 3d, 1908, in a certain proceeding in which said Rahway Valley Railroad Company was complainant and The Delaware, Lackawanna and Western Railroad Company was defendant, and upon the report and order made in said proceedings on June 24th,
53 1908, an application will be made to this court, at a regular motion term thereof, appointed to be held at the United States Circuit Court room, in the General Post-Office Building, in the borough of Manhattan, city and State of New York, on the 18th day of August, 1908, at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order herein, suspending the enforcement of the said order of June 24, 1908, of the said Interstate Commerce Commission, and enjoining and restraining any and all proceedings thereunder, pending the hearing and determination of this cause, and for such other and further relief in the premises as may be just and as the circumstances of the case may require.

Dated, New York, August 7th, 1908.

Yours, &c.,

WILLIAM S. JENNEY,
*Solicitor for Complainant.*
JOHN L. SEAGER,
*Of Counsel.*

To THE INTERSTATE COMMERCE COMMISSION and
THE RAHWAY VALLEY RAILROAD COMPANY.

54 In the Circuit Court of the United States for the Southern District of New York.

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| DELAWARE, LACKAWANNA AND WESTERN Railroad Company, complainant, vs. THE INTERSTATE COMMERCE COMMISSION and Rahway Valley Railroad Company, defendants. | In equity. June term, 1908. No. |

STATE OF NEW YORK, *County of New York, Southern District of New York*, ss:

John L. Seager, being duly sworn, says:

I am the solicitor for the complainant in the above-entitled cause. With William S. Jenney, general counsel of complainant, I had charge of the proceedings before the Interstate Commerce Commission in which the Rahway Valley Railroad Company was the complainant and The Delaware, Lackawanna and Western Railroad Company was the defendant, which resulted in the order herein complained of. Said proceeding was begun on or about the 20th day of November, 1907, by the filing of the petition of The Rahway Valley Railroad Company with the commission and the service thereof upon this complainant; that the complainant herein served its answer in the said proceeding on December 20th, 1907, whereupon a day for a hearing was set for April 2d, 1908. On said day and the day
55 succeeding a hearing was had and evidence taken in the city of New York, before Commissioner Lane; thereafter and on the 24th day of June, 1908, the said Interstate Commerce Commission made and duly served on complainant its report and order, a copy of which is attached to the bill of complaint herein, whereupon this complainant brought this, its suit, by the filing of its bill of complaint with the clerk of this court on the 7th day of August, 1908, for the purpose of obtaining a final decree declaring the said order invalid and restraining any and all proceedings thereunder.

The Rahway Valley Railroad is about ten miles long. It extends from Aldene, New Jersey, where it has a connection with the Central Railroad of New Jersey, in a northerly and westerly direction through the villages of Kenilworth and Springfield, to Summit, New Jersey, a station on the line of The Morris and Essex Railroad. It has also a branch about three-fourths of a mile long at its southerly end connecting with The Lehigh Valley Railroad at Roselle, New Jersey. The portion of the road from Kenilworth to Aldene and the branch to Roselle were acquired by consolidation, effective March 1, 1905, of the defendant railroad and the New Orange Four Junction Railroad. The construction of the portion from Kenilworth to Summit was begun on the Kenilworth end in September, 1901, and completed to the bridge over Park avenue at Summit, shown on the map attached to complainant's bill and marked "Exhibit A," one year later. The track shown on "Exhibit A" extending from the

main line over Park avenue and approaching complainant's right of way was not constructed until the fall of 1906. There are no industries located on said track and the same serves no shipper.

56 Aldene is distant fifteen miles from Jersey City and about 24 miles from Kenilworth; Roselle is sixteen miles from Jersey City and about two miles from Kenilworth. The Central Railroad of New Jersey has a connection with the Delaware, Lackawanna and Western Railroad system at Hampton Junction, some forty miles northwesterly from Aldene, at Lake Junction, a little farther north, at Phillipsburg, New Jersey, and at Scranton, Pennsylvania. The Lehigh Valley Railroad connects with the railroad of complainant at Phillipsburg, New Jersey. Shippers on the line of the Rahway Valley Railroad are able to reach every point which they could reach were the connection made at Summit as proposed. The defendant railroad has with the Lehigh Valley and Central Railroad of New Jersey and their various connections joint rates and through routes, the New York rate applying upon the shipments.

The equipment of the Rahway Valley Railroad consists of two locomotives, two passenger cars, and one freight car used to handle local freight only. One locomotive and the passenger cars are employed in a shuttle service between Summit and Aldene. The other locomotive is used on handling freight, nearly all of which moves from Kenilworth to the Central Railroad of New Jersey and the Lehigh Valley Railroad, and to Kenilworth from these roads. The freight moving to and from other points on the Rahway Valley Railroad is a negligible quantity.

The only industries located along the line of the Rahway Valley Railroad furnishing an appreciable amount of freight for transportation, as appears from the testimony adduced on the hearing before the Interstate Commerce Commission, hereinbefore mentioned, are as follows:

57 At Kenilworth, the American Circular Loom Company and the Wright Hardware Company. The first-mentioned concern handles 20,000 tons of freight annually, incoming and outgoing, 9,000 tons of which is raw material used by said company and coming from Pittsburg, and therefore not likely to come over the line of this complainant. As appears by the said testimony, this company makes no shipments to points which may not be reached by the Lehigh Valley Railroad or by the Central Railroad of New Jersey. The Wright Hardware Company manufactures wood-working machinery—band saws and tools. The greatest number of its shipments are by express. It originates no carload freight, and it sells all its product f. o. b. factory.

At Springfield, the Petrofoid Company and the Sickley Coal and Lumber Company, neither of which originates any carload freight, and neither of which handles any considerable amount of freight either incoming or outgoing.

At Springfield is a nursery, which provides ten or fifteen carloads yearly of trees and shrubbery.

At or near East Summit are three small stone-crushing plants, furnishing a small amount of carload freight, none of which is destined to exclusively Delaware, Lackawanna and Western points.

The Rahway Valley Railroad, in connection with the Central Railroad of New Jersey, operates a through passenger service from Summit to New York, the time made between the points named comparing favorably with the schedule time between the same points on the Morris and Essex Railroad.

As appears by report of the Rahway Valley Railroad, filed as required by law with the comptroller of the State of New Jersey, for the year ending December 31st, 1906, the floating debt of said road was $350,689.26; the cost of road and equipment, $333,689.26.

58 The receipts and expenses for said year, as per said report, were: Income from passengers, $4,435.92; income from freight, $14,375.03; income from other sources, $1,062.88; total income, $19,873.83. Expenditures during the year for working road, including repairs and maintenance of way, motive power, and contingencies, $30,942.70. As shown by the testimony of Mr. W. W. Cole, president of the defendant railroad, in the said proceeding before the Interstate Commerce Commission, the income thereof for the year 1907 was $24,000,000, and the operating expenses were in the neighborhood of 138% of such income.

Said Rahway Valley Railroad Company is regularly incorporated and existing as a railroad corporation under the railroad laws of the State of New Jersey. It is not an industrial railroad or an adjunct of an industrial concern. It is not a shipper in the ordinary sense of said term, or within the intent and meaning of said term as used in that clause of section 1 of the interstate-commerce act, referring to switch connections. Said road publishes and files tariffs with the Interstate Commerce Commission in which the Central Railroad of New Jersey and the Lehigh Valley Railroad Company with their various connections concur, and said Rahway Valley Railroad Company concurs in tariffs filed with said commission by said Central Railroad of New Jersey and Lehigh Valley Railroad and their connections, in which said tariffs interstate rates, both east and west, are quoted. Said railroad does not confine its operations to any particular industry or group of industries, or to the carriage of any particular commodity, but solicits the business of transporting persons and all kinds of property of the public generally, and has been and is engaged in such transportation in competition with complainant herein.

59 The Rahway Valley Railroad is owned and controlled by a group of capitalists and speculators of Elmira, New York. As I am informed and verily believe, the said company does not seek the connection proposed in order to serve the interests of the shippers along the line of its road. Such shippers do not reasonably require such physical connection at Summit. The owners of said road hope, as I am informed and believe, that if said road can be made a connecting link between complainant's road and the Jersey Central and Lehigh Valley roads so that freight and passengers between points on

such roads will move over a shorter route via complainant's line, then via the existing connections, said Rahway Valley Railroad will be of value and can be sold. It can then, it is hoped, force one of its connections aforesaid to buy it by the use of methods easily understood. With this road either the Jersey Central or the Lehigh Valley might injure the business of the complainant; with it complainant could injure them. The sources of information and the grounds of belief as to matters in this paragraph of my affidavit, stated upon information and belief, are the bill filed herein, the affidavits of Lincoln Bush, Gen. Joseph G. Sickles, hereto attached, and the testimony given upon the hearing before the commission hereinbefore mentioned.

JOHN L. SEAGER.

Subscribed and sworn to before me this 7th day of August, 1908.

[SEAL.] JOSEPH FIELL,
*Notary Public, New York County.*

60 In the Circuit Court of the United States for the Southern District of New York.

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| DELAWARE, LACKAWANNA AND WESTERN Railroad Company, complainant, *vs.* THE INTERSTATE COMMERCE COMMISSION and Rahway Valley Railroad Company, defendants. | In equity. June term, 1908. No. |

STATE OF NEW YORK, *County of New York,*
*Southern District of New York, ss:*

Lincoln Bush, being duly sworn, says:

I am and have been for five years last past chief engineer of the complainant herein.

Complainant's main trunk line of railroad runs from Hoboken to Buffalo, through the States of New Jersey, Pennsylvania, and New York. In New Jersey complainant also operates what is known as the Morris and Essex Railroad, extending from Hoboken via Newark, Summit, and Morristown, to Denville, where it connects with the so-called "Boonton Branch," which is located north of The Morris and Essex, and extends from Bergen Junction just outside of Hoboken, via Paterson, Passaic, and Boonton, to Denville. The Boonton branch is operated as part of the main line to Buffalo. There are also operated in connection with the Morris and Essex Railroad a branch leaving the main line at Roseville avenue, Newark, and ex-

61 tending to Montclair, and another branch leaving the main line at Summit and extending to Gladstone, this latter branch being known as the Passaic and Delaware branch.

The Morris and Essex Railroad and its two branches, the Montclair branch and the Passaic and Delaware branch above mentioned, traverse a suburban territory which is densely populated. Along

this line there is almost a continuous succession of cities and villages between Newark and Morristown, largely inhabited by people who daily travel over said railroad in going to and from business in the city of New York. This commuter traffic is very heavy and has been and is rapidly increasing. To provide for this increased burden there has been a necessity for increased facilities. I have prepared plans for such facilities throughout the suburban territory referred to as far west as Morristown. These plans contemplate the elimination of the numerous grade crossings through the various suburban towns and the completion of a third track all the way to Summit. In the execution of these plans we have already eliminated the grade crossings through the city of Newark, through Harrison and Summit, also some of the crossings west of South Orange, by depressing and elevating the tracks. We have constructed a stretch of third track through Newark. From Highland avenue, the first station west of Orange, to the village of Millburn, a distance of four and one-half miles, the third track is completed, a portion of the same having been constructed last year.

To accommodate this suburban traffic we have built an expensive passenger terminal station at Hoboken and have installed in the yard there a comprehensive interlocking plant. Last year we built at Millburn and Short Hills new passenger stations. All of these
62 improvements referred to, and in short all the constructions since 1900 have been so built as to accommodate the third track when the same is ready to be placed. The masonry of new bridges built within the last three years has been so extended as to receive the third track. About ninety per cent of the necessary right of way for the third track improvement through the Oranges has been acquired.

Exclusive of the new passenger station at Hoboken we have spent fully $1,000,000 during the last eight years on these improvements, in order to provide better and increased facilities with which to handle the suburban traffic on this line.

This third track improvement the complainant expects during the coming year to continue and complete if possible, as deponent is informed and believes.

The third track now constructed is used by express trains, for the purpose of running around and passing the various local trains.

On account of the residential character of the territory served by The Morris and Essex Railroad very little freight originates there. The freight which does move on said track is almost entirely for local consumption in that territory. Every effort is made by the officials of complainant to relieve the Morris and Essex road of freight traffic. All through freight is moved over the Boonton branch which is not embarrassed by suburban traffic. Freight originating at Summit and points west and destined to Harrison and Newark or points east thereof, is not moved through on the Morris and Essex rails, but is sent around via Denville over the Boonton branch to points east.

Freight originating at Harrison or Newark is taken to Hoboken, if fast freight, and to Secaucus on the Boonton branch if slow freight.

63 The Boonton branch is much more favorable to the movement of freight. Approaching Summit from the east there is a stiff adverse grade commencing a short distance west of Milburn and running to Summit, some stretches of which are as steep as eighty feet to the mile. West of Summit against eastbound traffic there is a grade of seventy-five feet to the mile. Against westbound traffic there is between Madison and Convent an adverse grade of sixty-five feet to the mile. On the Boonton branch, on the other hand, there is a much lighter grade, fewer curves, and these of a lesser degree of curvature.

That the following is a comparative statement of the grades and curvatures of the two branches:

*Hoboken to West End Tunnel.*

| | | | |
|---|---|---|---|
| Length of ascending grade | 1.57 miles | Rise in feet 34.07 | |
| Level, line | 0.31 miles | | |

*West End Tunnel to Denville via Paterson.*

| | | | |
|---|---|---|---|
| Length of ascending grade | 18.35 miles | Rise in feet 539.91 | A |
| Length of descending grade | 8.47 miles | Fall in feet 56.57 | B |
| Length of level line | 5.08 miles | | C |
| | 31.93 miles | | |
| Length of curved line | 10.21 miles | "D" | |
| Length of tangent | 21.72 "F" 31.93 miles | 1 | |
| Total angle | 1288 deg., 56 min. "F" | | |

*West End Tunnel to Denville via Newark.*

| | | | |
|---|---|---|---|
| Length of ascending grade | 19.99 miles | Rise in feet 822.09 | A |
| Length of descending grade | 12.39 miles | Fall in feet 340.14 | B |
| Length of level line | 2.89 miles | | C |
| | 34.27 miles | | |
| Total curve line | 12.56 "D" | | |
| Total tangent | 21.71 "E" | | |
| | 34.27 miles | | |
| Total angles | 1913 deg., 26 min. "F" | | |

That the map "Exhibit A," referred to in the bill of complaint herein, and forming a part thereof, correctly represents the location of the tracks of complainant's road and of the road of the Rahway Valley Railroad Company, together with the physical

64 features, at and immediately adjoining the proposed point of connection at Summit, which is designated on said Exhibit A by the letter B. That the scale of said map is one hundred feet to one inch. The plan for the third track improvement hereinbefore

referred to by me contemplates the use of the tracks with which the Rahway Valley desires to connect at Summit as the "Main Line eastbound track" and said track will of necessity have to be used as such eastbound main line track on account of the topography of the country at the point mentioned. The steep, rocky rise to the north of the main line track designated on Exhibit A as "rock cut," prevents the placing of a third track on that side of complainant's right of way, except at great expense. There is no room for additional tracks on the south side of complainant's right of way.

LINCOLN BUSH.

Subscribed and sworn to before me this 7th day of August, 1908.

[SEAL.] JOSEPH FIELL.
*Notary Public, New York County.*

65 In the Circuit Court of the United States, for the Southern District of New York.

| | |
|---|---|
| DELAWARE, LACKAWANNA AND WESTERN RAILROAD Company, complainant. *vs.* THE INTERSTATE COMMERCE COMMISSION AND Rahway Valley Railroad Company, defendants. | In equity. June term, 1907. No. ——. |

STATE OF NEW YORK, COUNTY OF NEW YORK,
*Southern District of New York, ss:*

Joseph G. Sickles, being duly sworn, says:

I have been in the employ of the complainant herein, in the operating department, for a period of nine years, commencing with May, 1899, first as train master, and then, from November 1, 1907, to May 1, 1908, as assistant superintendent of the Morris and Essex Division of complainant's railroad system. During my incumbency as assistant superintendent I had direct charge of the practical operation of the said division.

The main trunk line of complainant's railroad runs from Hoboken via Bergen Junction, Paterson, Passaic, Boonton, Scranton, and Binghamton to Buffalo. That part of the said main trunk line between Bergen Junction and Denville is known as the "Boonton branch." The Morris and Essex Railroad, operated by complainant under a lease thereof, extends from Hoboken, New Jersey,
66 in a westerly and southerly direction to Denville and Dover on the said main trunk line. In connection with the said Morris and Essex Railroad there are operated a branch line leading off the main line at Roseville avenue, Newark, and extending thence to Montclair, New Jersey, and another branch known as the Passaic and Delaware Branch leading off the main line one and one-half miles west of Summit and extending to Gladstone, New Jersey. The stations on the main line of the Morris and Essex Division in their order from Hoboken, going west, are as follows: Harrison, Newark,

Roseville avenue (Newark), Grove street (Newark), East Orange, Brick Church, Orange, Highland Avenue (West Orange), Mountain Station, South Orange, Maplewood, Milburn, Short Hills, Summit, Chatham, Madison, Convent, Morristown, Morris Plains, Denville. The distance from Hoboken to Newark is seven miles; to Summit twenty miles; to Morristown thirty miles; to Denville thirty-six miles. From Summit to Gladstone on the Passaic and Delaware branch twenty-one miles.

As the Morris and Essex Railroad traverses a densely populated suburban territory, inhabited largely by people who daily travel over said line to and from business in New York City, the great bulk of the business on said line is passenger traffic. The population of the section served by this railroad has increased very rapidly during the ten years last past, and especially during the last three years. Since the completion of the new Hudson River Tunnel the increased facilities for quick transportation thereby afforded has greatly augmented the travel over said railroad.

In order to present a clear idea of the burden imposed upon the facilities of the Morris and Essex Railroad by its commuter travel, I would state that fifty-four thousand commuters were
67 daily handled during the month of March, 1908, over this railroad, requiring each day the use of four hundred and ninety-four coaches moving easterly, and two hundred and ninety-six coaches moving westerly, some of the coaches making two or three trips. There are run out of Hoboken daily one hundred and ten passenger trains westerly, and one hundred and eight easterly, in handling this traffic. East and westbound through Summit, according to the present schedule, are forty-one trains each way per day. In addition there are five passenger trains daily running through from Hoboken to Gladstone on the Passaic and Delaware branch, also seven trains each way per day terminating at Summit. The figures I have given as to the number of trains is the regular working schedule. In the summer months the number of trains are increased by twelve to fifteen aditional ones. To give an idea of the increase during the last few years, in the pasenger traffic carried on this line, I would say that in 1899 it required fifty-nine passenger coaches at South Orange to take care of our business there in the morning; now it takes seventy-five coaches there. At Montclair, in 1899, it required twenty-six coaches to start business in the morning; it now requires thirty-eight coaches. At other points along the line the increase has been in about the same proportion. The rapidity of the increase in the pasenger traffic in and out of Summit is shown by the income from said traffic and the number of passengers handled during 1906 and 1907. The earnings for 1906 for local passenger business at Summit was $110,625.00; in 1907 such earnings amounted to $119,814.00. The number of passengers handled out of Summit in 1906 was 123,031; in 1907, 125,252. An increase in like proportion is shown at all suburban towns along said line.

68 This vast increase in passenger traffic has required increased facilities in handling the same. A vast sum of money has been expended during the last five years in building a costly passenger terminal at Hoboken, in erecting new stations at other points along the line, in depressing and elevating tracks, particularly through Newark and Summit, so that grade crossings might be eliminated. A new terminal has been erected at Twenty-third street, New York. A second double track tunnel is nearing completion through Bergen Hill west of Hoboken. The fleet of ferry boats maintained for the purpose of handling suburban traffic across the Hudson River to New York has of late been largely augmented.

Notwithstanding all these increased facilities, and notwithstanding the fact that there has been a great increase in the number of trains, in the number of coaches per train, and in the motive power, the complainant has been unable to keep pace with the growth of its suburban traffic. Its trains are every day arriving at Hoboken overcrowded with people, who are obliged to stand for the want of seats. Great difficulty has been experienced in the last three years in handling this traffic and in operating the trains with sufficient frequency and on schedule time.

Attached hereto and marked "Exhibit E" is the time table and train schedule at present in force on The Morris and Essex Railroad and its branches.

On account of residential character of the district referred to, very little carload freight originates along the line of the Morris and Essex Railroad, the freight that is necessarily moved thereover being almost wholly for consumption in said territory. Between Hoboken and Morristown, with the exception of one side track serving a brewery at Orange, New Jersey, there are no main track
69 connections with any industries along the line of this road.

At an early day the complainant constructed its Boonton branch, from Bergen Junction, a short distance west of Hoboken, to Denville, and thereby diverted all of its main trunk line traffic from said Morris and Essex Railroad, yet, nevertheless, about the year 1900 the officials of the complainant were experiencing difficulty in handling even such freight over the Morris and Essex Division as was destined to or moving from points thereon, because of the burden imposed by the heavy suburban traffic which I have hereinbefore described. It had then become apparent that it was futile to attempt to develop and carry on a freight business on those tracks, and that complainant must, in order to meet what it considered its primary duty of properly handling its great passenger traffic, relieve the said division, so far as possible, of freight traffic. A policy was then adopted and since followed, which contemplated two things: 1st. That all industrial developments would be sought on its Boonton branch, which would be largely devoted to freight traffic, and upon which there would be resisted any building up of suburban train passenger business; 2d. That at the same time it would dis-

courage the location of industries on the Morris and Essex Division and seek to confine the business to passenger traffic.

Since this policy was adopted no main line connections with industrial plants have been made on said railroad, and the numerous applications for side-track connections therewith have been uniformly discouraged and refused. Moreover, many side tracks formerly in existence on said division were abandoned in connection with the depression and elevation improvements at Newark and Summit. In many cases officials of the Morris and Essex Railroad have succeeded in inducing those contemplating the location of new industries on this division to establish the same on the Boonton branch, where there is no embarrassment by reason of suburban traffic.

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In furtherance of the policy above described, of relieving the Morris and Essex tracks of freight traffic so far as possible, freight originating at Summit and west thereof and on the Passaic and Delaware branch, destined to the east, is hauled west to Denville, then via the Boonton branch to Newark or to Hoboken if for points on the main line, thus relieving the Morris and Essex division between Newark and Summit of this traffic. Freight originating at Newark or Harrison destined for the west, unless consigned to a point between Summit and Newark, is taken around to the Secaucus yard on the Boonton branch if slow freight, and to Hoboken if to be moved in fast freight trains. None of such freight is sent west over the Morris and Essex division. Freight from the west on the main line destined to Newark or Harrison is never moved over the Morris and Essex tracks, but is taken to Secaucus over the Boonton branch and thence drilled to destination. But one freight train per day and one at night is operated in each direction over the Morris and Essex division. These are moved during the lull in the suburban service. Such freight trains have to be moved with light loads in order that speed may be maintained so as not to block, impede, or interfere with passenger traffic. The Boonton branch is much more favorable to the movement of freight than is the Morris and Essex division, for the reason that the grades are steeper and the curvatures greater on the Morris and Essex Railroad, as appears by the affidavit of Chief Engineer Bush, attached hereto, and for the further reason that the Boonton branch is unembarrassed by suburban traffic.

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The inconvenience and difficulties under which the complainant labors in moving freight necessarily passing over the rails of the Morris and Essex Railroad are present at Summit as well as generally on said railroad. The location of the tracks of the complainant and the physical features generally at and in the vicinity of the point where the Rahway Valley Railroad proposes to have physical connection with complainant is shown on "Exhibit A," attached to the bill in equity filed herein. The tracks in green are those of the Rahway Valley Railroad. The point of connection proposed is at or about the point marked "B" on said exhibit. The tracks in brown are the

main line tracks of complainant, the more southerly of which is the eastbound track and the more northerly the westbound track. Passing to the west of the proposed point of connection, these tracks enter a depression about twenty feet below grade, extending through the city of Summit and flanked on either side by concrete walls shown on said "Exhibit D." The three tracks in yellow next south of said main track are used almost exclusively as sidings and storage tracks for passenger coaches and trains starting from or terminating at Summit, including those operated over the Passaic and Delaware branch. Such passenger trains being obliged to run onto said sidings in order to clear the main line track for main line traffic, to turn locomotives, and to detach coaches from Passaic and Delaware trains terminating at Summit in order to shift the same to the main line tracks and there connect the same with main line trains. The said three tracks in yellow, therefore, constitute the terminal facilities for handling passenger equipment used in operating trains on
72 the Passaic and Delaware branch terminating at Summit, as well as other trains there terminating. All trains coming into or departing from Summit on the Passaic and Delaware branch run onto and depart from the said first track in yellow next southerly of the main line tracks in brown. The space occupied by the tracks in yellow next southerly of the concrete wall flanking the main line tracks on the south is the local Summit freight yard, which, on account of its limited capacity, is used solely for local freight, no drilling being done there. Freight destined for delivery there is first detached from the regular freight train and then placed in the yard at West Summit, one and a half miles west, and thereafter switched down the main line track to the said local yard as opportunity offers. Freight originating in said local yard and empty cars therefrom are picked up by a switch engine, drilled to the yard at West Summit, and there assembled into trains. In thus drilling cars between the local Summit yard and the assembling yard at West Summit, it is necessary to cross the eastbound track to the westbound track at Summit and to cross from the westbound track to the eastbound track at Passaic and Delaware Junction in order to enter the West Summit yard. Involving, as they do, the running on the main tracks between the two yards mentioned and the crossing at two points from one main line track to the other in order to enter and leave said local yard, thereby blocking both the east and westbound tracks at Summit and at the Passaic and Delaware Junction, these drilling or switching movements are inconvenient and difficult to perform without blocking, impeding, and endangering the movement of passenger traffic. Breakdowns or other accidents during such movements, preventing the clearing of the main track, inevitably result in delaying one
73 or more passenger trains and in many cases in disarranging for the day the entire train schedule of the line. If complainant were compelled to accept cars from the line of defendant railroad at the point contemplated by said order, the inconvenience, difficulties, and dangers hereinbefore mentioned would not only be multiplied, but

new difficulties and dangers would be presented, for, while there would be the same movement over and across main line tracks, there would be the further task of avoiding Passaic and Delaware trains and other trains terminating at Summit, which, as hereinbefore shown, are obliged to take the siding to which it is proposed to connect the Rahway Valley tracks.

Moreover, when the third track improvement hereinbefore mentioned is completed the track of complainant with which a connection is ordered to be made by the commission will of necessity become the main line eastbound track, and such connection, if made, would involve a facing point switch on a main line track, which is concededly dangerous and contrary to good railroad practice.

JOHN G. SICKLES.

Subscribed and sworn to before me this 7th day of August, 1908.
[SEAL.] JOSEPH FIELL,
*Notary Public, New York County.*

* * * * * * *

126 (Endorsed:) In the Circuit Court of the United States for the Southern District of New York. In equity. The Delaware, Lackawanna and Western Railroad Company, complainant, vs. Interstate Commerce Commission and Rahway Valley Railroad Company, defendants. Affidavits and notice of motion on application for an injunction pendente lite. John L. Seager, solicitor for complainant. W. S. Jenney, of counsel. U. S. Circuit Court, Southern District N. Y. Filed Oct. 20, 1908. John A. Shields, clerk.

127 United States Circuit Court, Southern District of New York.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY
*vs.*
INTERSTATE COMMERCE COMMISSION AND RAHWAY VALLEY RAILROAD COMPANY.

*Before Lacombe, Ward, and Noyes, circuit judges.*

That portion of sec. 1 of the interstate commerce act which deals with switch connections provides that any common carrier subject to the provisions of the act shall (in certain contingencies) construct, maintain, and operate a switch connection upon the application either of "any lateral branch line of railroad" or of "any shipper tendering interstate traffic for transportation." Further on in the section where provision is made for hearing, investigation, determination, and the making of an order by the commission, it is provided that such procedure shall be had when the common carrier shall fail to install and operate such switch connection "on application therefor in writing by any shipper" and when "such shipper may make complaint to the commission." In this part of the section there is no provision as to

any such application or complaint made by the "lateral branch line." It may be that this is an oversight. Quite probably Congress intended to allow the lateral branch line as well as the shipper to invoke the action of the commission, but it has not said so in this stat-
128 ute, and we all agree in the conclusion that it is not for this court to amend the act.

In the case at bar there was no written application by any shipper nor any complaint by such shipper to the commission; the "lateral branch line" was the only moving party. In the absence of such written application and complaint we think it was without power to make the order complained of. An order for preliminary injunction may issue.

(Endorsed:) Circuit Court of the United States for the Southern District of New York. Delaware, Lackawanna & Western Railroad Company vs. Interstate Commerce Commission and Rahway Valley Railroad Company. Opinion. U. S. Circuit Court, Southern District N. Y. Filed Oct. 22, 1908. John A. Shields, clerk.

129 United States Circuit Court, Southern District of New York.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, complainant,

*against*

INTERSTATE COMMERCE COMMISSION AND THE RAHWAY VALLEY RAILROAD COMPANY, defendants.

CITY, COUNTY, AND STATE OF NEW YORK,
*Southern District of New York, ss:*

Joseph A. Kelly, being duly sworn, deposes and says: That he is eighteen years of age and is a clerk in the office of the legal department of The Delaware, Lackawanna and Western Railroad Company, at 90 West street, borough of Manhattan, city of New York.

That on the 9th day of November, 1908, at No. 5 Nassau street, in the borough of Manhattan, city of New York, he served the proposed order and notice of settlement in the above-entitled action, which are hereto annexed, upon Charles A. Collin, esq., solicitor for The Rahway Valley Railroad Company, by delivering to and leaving with James Gore, personally, a clerk in his force and in charge thereof, a true copy of said proposed order.

That on the said 9th day of November, 1908, at the United States district attorney's office, in the general post-office building in the city of New York, he served the proposed order and notice of settlement herein, which are hereto annexed, upon Henry L. Stimson,
130 esq., solicitor for the Interstate Commerce Commission herein, by delivering to and leaving with E. Frank Lloyd, personally, a clerk in the office of said Henry L. Stimson, esq. (who is also United States district attorney for the southern district of New York), a true copy of said proposed order.

Deponent further says that he knew the persons so served as aforesaid, and knew the said James Gore to be a clerk in charge of said Charles A. Collin's office, and the said E. Frank Lloyd to be a clerk in charge of the office of said Henry L. Stimson, esq.

Sworn and subscribed to before me this 11th day of November, 1908.

JOSEPH A. KELLY.

[SEAL.] JOSEPH FIELL,
*Notary Public, New York County.*

131 At a Term of the Circuit Court of the United States, held at the court room thereof, in the general post-office building, in the borough of Manhattan, city of New York, on the 20th day of October, 1908.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, circuit judges.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, complainant,

*vs.*

INTERSTATE COMMERCE COMMISSION AND THE RAHWAY VALLEY RAILROAD COMPANY, defendants.

This cause having come on to be heard on motion of complainant for a preliminary injunction, and for a suspension of the order of the Interstate Commerce Commission hereafter referred to, which said motion was originally noticed for a regular motion term of this court appointed to be held on the 18th day of August, 1908, and was thereafter regularly adjourned from term to term until the 16th day of October, 1908, when the same was, by consent of counsel and by direction of the judge holding the last-mentioned motion term, assigned to be heard on October 20th, 1908, before this court, and on reading the bill filed herein on August 7th, 1908, and on reading and filing notice of this motion for an injunction, and proof of service thereof, and of the affidavits on behalf of the complainant annexed thereto, and the defendant, the Interstate Commerce Commission, having filed a demurrer to the bill herein, and the defendant,

132 The Rahway Valley Railroad Company, having, on leave therefor duly granted in open court on the hearing of this motion, withdrawn its answer herein theretofore filed by it, with leave to file a demurrer in place and stead thereof:

And after hearing William S. Jenny, of counsel for the complainant, in favor of said motion, and Luther M. Walter, esq., counsel for the defendant, Interstate Commerce Commission, and E. L. McKirgan, esq., counsel for the defendant, The Rahway Valley Railroad Company, in opposition thereto; it is

Ordered, That the order dated June 24th, 1908, of the Interstate Commerce Commission, made and filed in a certain proceeding then pending before the said commission, entitled "The Rahway Valley

Railroad Company, complainant, against The Delaware, Lackawanna and Western Railroad Company, defendant," directing the said The Delaware, Lackawanna and Western Railroad Company, on or before September 1st, 1908, to construct and thereafter maintain and operate a physical connection, at Summit, New Jersey, between its railroad and the railroad of The Rahway Valley Railroad Company, be, and the same hereby is suspended until the hearing and determination of this action and the entrance of a decree by this court therein. And it is

Further ordered, That a writ of injunction issue out of and under the seal of this court, directed to the Interstate Commerce Commission and the said Rahway Valley Railroad Company, enjoining and restraining them, and each of them, and each of their servants, agents, and attorneys from taking, instituting, or prosecuting, or attempting to take, institute, or prosecute any action or proceeding, whatso-
133 ever to enforce said order dated June 24th, 1908, of said Interstate Commerce Commission, or any proceeding whatsoever, under or based upon said order, or any disobedience thereof, until the final hearing and determination of this cause, or until the further order of this court.

E. Henry Lacombe, *U. S. C. J.*

(Endorsed:) United States Circuit Court, Southern District of New York. The Delaware, Lackawanna and Western Railroad Company vs. Interstate Commerce Commission and The Rahway Valley Railroad Company. Order. J. L. Seager, solicitor for complainant, office and post-office address, 90 West street, borough of Manhattan, New York City. W. S. Jenney, of counsel. U. S. Circuit Court, Southern District of N. Y., filed Nov. 13, 1908. John A. Shields, clerk.

134 In the Circuit Court of the United States within and for the Southern District of New York.

The Delaware, Lackawanna and Western Railroad Company, complainant,

*vs.*

The Interstate Commerce Commission and The Rahway Valley Railroad Company, defendants.

Please take notice that the undersigned, on behalf of the Interstate Commerce Commission of the United States, hereby appeals from the decision of this court rendered herein and dated on the 16th day of November, 1908, to the Supreme Court of the United States.

Dated New York, December 1, 1908.

Henry L. Stimson,

*United States Attorney for the Southern District of New York,*
*Solicitor for the Interstate Commerce Commission.*

(Endorsed:) U. S. Circuit Court, Southern District of New York. The Delaware, Lackawanna & Western Railroad Co. vs. Interstate

Commerce Commission and The Rahway Valley Railroad Company. Notice of appeal. Henry L. Stimpson, United States attorney, attorney for defendant, Interstate Commerce Commission. Service of a copy of the within is hereby admitted. New York, Dec. 3, 1908. John L. Seager, solicitor for complainant. U. S. Circuit Court, Southern District of N. Y. Filed Dec. 2, 1908. John A. Shields, clerk.

135 In the Circuit Court of the United States within and for the Southern District of New York.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, complainant,

*vs.*

THE INTERSTATE COMMERCE COMMISSION AND THE RAHWAY VALLEY Railroad Company, defendants.

PETITION FOR APPEAL.

*To the honorable judges of said court:*

The Interstate Commerce Commission, one of the defendants herein, being a bureau or department of the Government of the United States, by Henry L. Stimson, esq., United States attorney for the Southern District of New York and solicitor for the said Interstate Commerce Commission, conceiving itself aggrieved by the order and decree made and entered by the above-mentioned Circuit Court in the above-entitled cause on the 16th day of November, 1908, directing a preliminary injunction to issue restraining and suspending the enforcement of an order by this department or commission, complains that there is manifest error to its injury, and for the reasons set forth in the assignment of errors filed herewith, prays that this the defendant's petition for its appeal from the above-mentioned decree or order may be allowed to the Supreme Court of the United States.

HENRY L. STIMSON,
*United States Attorney for the Southern District of New York,*
*Solicitor for the Interstate Commerce Commission.*

136 (Endorsed:) U. S. Circuit Court, Southern District of New York. The Delaware, Lackawanna & Western Railroad Co. vs. Interstate Commerce Commission and The Rahway Valley Railroad Company. Petition for appeal. Henry L. Stimson, United States attorney, attorney for defendant, Interstate Commerce Commission. Service of a copy of the within is hereby admitted. New York, Dec. 3, 1908. John L. Seager, solicitor for complainant. U. S. Circuit Court, Southern District N. Y. Filed Dec. 2, 1908. John A. Shields, clerk.

137 In the Circuit Court of the United States within and for the Southern District of New York.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, complainant,

*vs.*

THE INTERSTATE COMMERCE COMMISSION AND THE RAHWAY VALLEY Railroad Company, defendants.

ORDER ALLOWING APPEAL.

On reading and filing the petition of the Interstate Commerce Commission presented by Henry L. Stimson, esq., United States attorney for the Southern District of New York and solicitor for the Interstate Commerce Commission for an order allowing an appeal, and the assignment of errors herein, it is

*Ordered*, That the said appeal be and the same is hereby allowed and that a certified transcript of the record herein be forthwith transmitted to the Supreme Court of the United States.

E. HENRY LACOMBE, *Circuit Judge.*

(Endorsed:) U. S. Circuit Court, Southern District of New York. The Delaware, Lackawanna & Western Railroad Company vs. Interstate Commerce Commission and The Rahway Valley Railroad Company. Order allowing appeal. Henry L. Stimson, United States attorney, attorney for defendant. Service of a copy of the within is hereby admitted. New York, Dec. 3, 1908. John L. Seager, solicitor for complaint. U. S. Circuit Court, Southern District N. Y. Filed Dec. 2, 1908. John A. Shields, clerk.

138 In the Circuit Court of the United States within and for the Southern District of New York.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, complainant,

*vs.*

INTERSTATE COMMERCE COMMISSION AND THE RAHWAY VALLEY RAILroad Company, defendants.

ASSIGNMENT OF ERRORS.

And now comes the Interstate Commerce Commission, by Henry L. Stimson, United States attorney for the Southern District of New York, and charges that in the order and decree rendered by said Circuit Court for said district in the above-entitled cause, on the 16th day of November, 1908, wherein and whereby said court suspended the order of the Interstate Commerce Commission as therein shown

and restrained and enjoined the enforcement of the same, and in the record and proceedings therein there is manifest error to its injury in this, to wit:

I. Said Circuit Court erred in not dismissiing the bill of complaint for want of equity.

II. Said court erred in making the order or decree granting a preliminary injunction restraining the enforcement of the order of this defendant.

III. Said court erred in holding that the Rahway Valley Railroad is not a shipper within the meaning of that provision of section 1 of the act to regulate commerce as amended, which provides, among other things, that "a shipper" may make complaint to the
139 Interstate Commerce Commission praying for a switch connection with common carriers subject to said act.

IV. Said court erred in holding that this defendant was without power to make the order complained of.

V. Said court erred in holding that the order complained of was not a lawful order.

VI. Said court erred in restraining the enforcement of the order of this defendant.

And the Interstate Commerce Commission aforesaid, plaintiff in error, prays that the order aforesaid for the errors aforesaid and other errors in the record and proceedings herein may be reserved and altogether held for nothing, and that the plaintiff in error may be restored to all things which it has lost by reason of said order; that the circuit court be directed to vacate and set aside said order and compel the defendant, The Delaware, Lackawanna & Western Railroad Company, to do what of right and according to the law and custom of the United States ought to be done.

HENRY L. STIMSON,
*United States Attorney for the Southern District of New York,*
*Solicitor for the Interstate Commerce Commission.*

(Endorsed:) U. S. Circuit Court, Southern District of New York. The Delaware, Lackawanna & Western Railroad Co. vs. Interstate Commerce Commission and The Rahway Valley Railroad Company. Assignment of errors. Henry L. Stimson, United States attorney, attorney for I. C. C. Service of a copy of the within is hereby admitted. New York, Dec. 3, 1908. John L. Seager, solicitor for complainant. U. S. Circuit Court, Southern District N. Y. Filed Dec. 2, 1908. John A. Shields, clerk.

140 In the Circuit Court of the United States within and for the Southern District of New York.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, complainant.

*vs.*

THE INTERSTATE COMMERCE COMMISSION AND THE RAHWAY VALLEY Railroad Company, defendants.

CITATION ON APPEAL.

The United States of America, Second Judicial Circuit.

*The President of the United States to the Delaware, Lackawanna & Western Railroad Company, or to William L. Jenney, its Solicitor of Record, Greeting:*

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to the appeal sued out and filed in the clerk's office in the United States circuit court for the southern district of New York, in the case wherein the Interstate Commerce Commission was one of the defendants and the Delaware, Lackawanna & Western Railroad Company was complainant, to show cause, if any there be, why the decree rendered against the said
141 Interstate Commerce Commission as in said petition for appeal mentioned should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable E. Henry Lacombe, U. S. Circuit Court Judge for the said Second Judicial Circuit, this 2nd day of December, in the year of our Lord one thousand nine hundred and eight.

*Circuit Judges.*

142 (Endorsed:) Eq. 3 84. U. S. Circuit Court, Southern District of New York. The Delaware, Lackawanna & Western Railroad Company versus The Interstate Commerce Commission and The Rahway Valley Railroad Company. Citation. Henry L. Stimson, United States attorney. Service of a copy of the within is hereby admitted. New York, Dec. 3, 1908. John L. Seager, solicitor for complainant. Filed Dec. 3, 1908. U. S. Circuit Court, Southern District, N. Y. John A. Shields, clerk. E. & A. C. 2848.

143 UNITED STATES OF AMERICA,

*Southern District of New York, ss:*

I, John A. Shields, clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second

Circuit, do hereby certify that the foregoing pages, numbered from one to 142, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled The Delaware, Lackawanna & Western Railroad Company, complainant, appellee, against The Interstate Commerce Commission and The Rahway Valley Railroad Company, defendants, appellants, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this ninth day of January, in the year of our Lord one thousand nine hundred and nine, and of the independence of the said United States the one hundred and thirty-third.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States Supreme Court. The Delaware, Lackawanna & Western R. R. Co., complt., appellee, vs. The Interstate Commerce Commission and The Rahway Valley R. R. Co., defts., appellants. Transcript of record from the Circuit Court of the United States for the Southern District of New York.

144 In the Supreme Court of the United States. October Term, 1908.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT.

*vs.*

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

DESIGNATION OF PARTS OF RECORD TO BE PRINTED, ETC.

The CLERK OF THE SUPREME COURT OF THE UNITED STATES.

SIR: In accordance with rule 10, section 9, you are informed that the Government will rely upon the errors set out in the assignment of errors appearing at page 138 of the original transcript of the record in the above-entitled cause, and that for the consideration of the court the Government deems it necessary that the entire transcript of the record should be printed, with the exception of the blueprint appearing at page 102 (which blueprint is a duplicate of that appearing at page 34) and Exhibit E, being time-table No. 16 of the Delaware, Lackawanna & Western Railroad Company, Morris and Essex Division and branches, appearing at pages 103 to 125 of the original transcript.

H. M. HOYT,
*Solicitor-General.*

FEBRUARY 17, 1909.

(Indorsed:) Original. Due service of a copy of the within is hereby admitted, February 18, 1909. C. A. Collin, Atty. for W. S.

Jenney. J. L. Seager for D. L. W. Received Mar. 6, 1909. Office of the Clerk, Supreme Court U. S.

145 RETURN ON SERVICE OF WRIT.

UNITED STATES OF AMERICA,
*District of New Jersey, ss:*

I hereby certify and return that I served the annexed notice on the therein-named E. L. McKirgan by handing to and leaving a true and correct copy thereof with adult member of family, his wife, at Summit, N. J., in said district on the twenty-seventh day of February, A. D. 1909.

THOS. J. ALCOTT, *U. S. Marshall,*
By LOUIS G. BEEKMAN, *Deputy.*

146 (Endorsed:) File No. 21519. Supreme Court U. S. October Term, 1908. Term No. 723. The Interstate Commerce Commission, appt., vs. The Delaware, Lackawanna & Western R. R. Co. Specification of errors relied upon and designation by counsel for appellant of parts of record to be printed & proof of service of same. Filed March 6th, 1909.

147 The Supreme Court of the United States. October Term, 1909.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,
*v.*
THE DELAWARE, LACKAWANNA & WESTERN R. R. Co. } No. 362.

STIPULATION.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in printing the transcript of the record therein the clerk may omit the bill of complaint and exhibits thereto where they appear for the second time, on the hearing of a motion for an injunction pendente lite, being pages 71 to 103, inclusive, of the transcript as filed, the same being a duplication of matter which appears elsewhere in the record.

LLOYD W. BOWERS,
*Solicitor General, Counsel for Appellant.*
M. E. OLMSTED,
*Counsel for Appellee.*

OCTOBER 19, 1909.

148 (Endorsed:) File No. 21519. Supreme Court U. S. October Term, 1909. Term No. 362. Interstate Commerce Commission, appellant, vs. The Delaware, Lackawanna & Western Rail-

road Company. Stipulation to omit part of transcript of record in printing. Filed October 29, 1909.

149 (Indorsement on cover:) File No. 21519. S. New York, C. C. U. S. Term No. 362. The Interstate Commerce Commission, appellant, vs. The Delaware, Lackawanna & Western Railroad Company. Filed February 18th, 1909. File No. 21519. Received Jan. 11, 1909. Office of the clerk. Supreme Court U. S.

Office Supreme Court, U. S.
FILED
OCT 8 1909
JAMES H. MCKENNEY,
Clerk

No. 362.

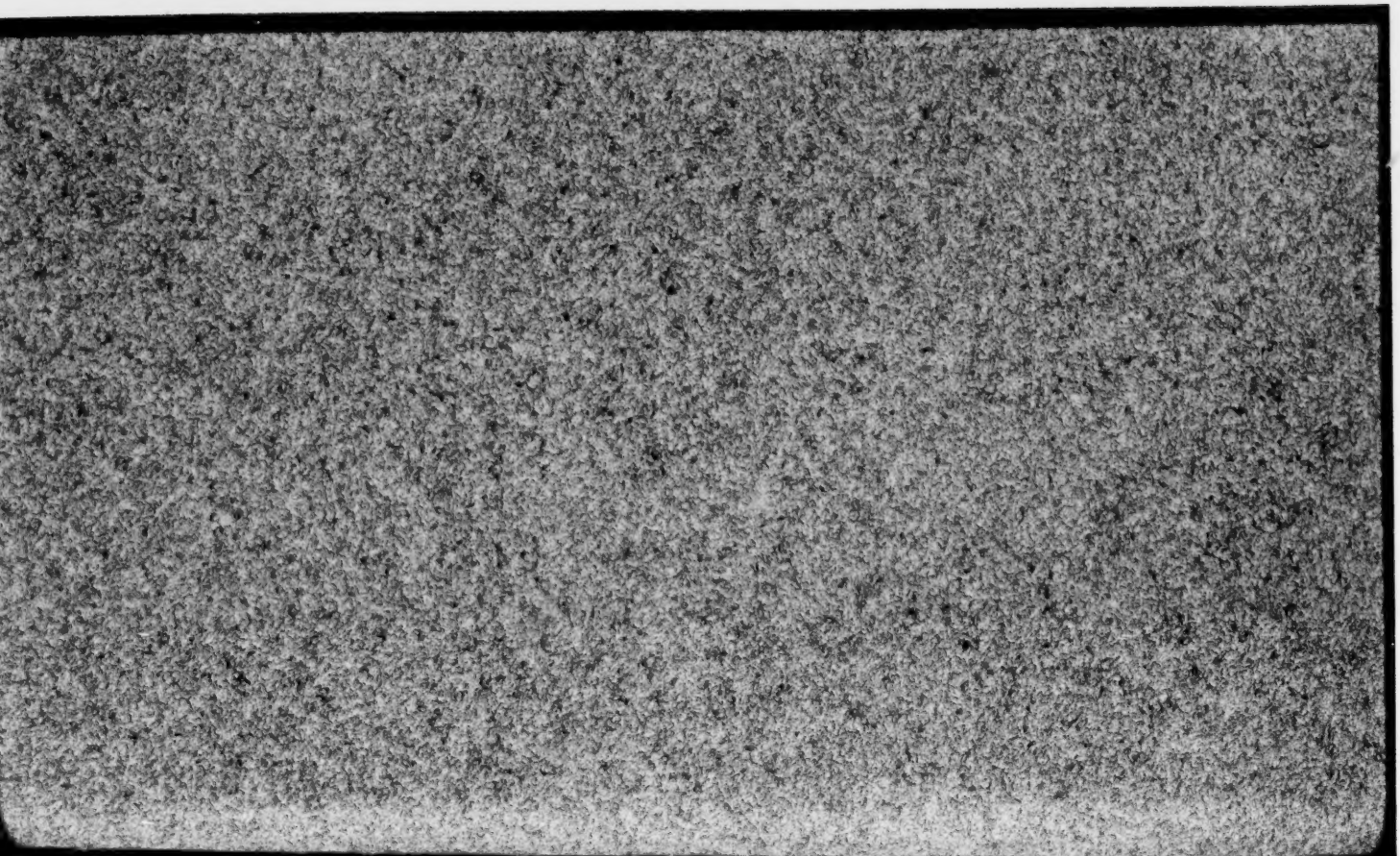
# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,
v.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## MOTION TO ADVANCE.



# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE INTERSTATE COMMERCE COMMISSION, appellant,
*v.*
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, appellee.

No. 362.

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

## MOTION TO ADVANCE.

On behalf of the appellant the Solicitor-General respectfully moves the court to advance the above-entitled cause for hearing during the present term, for the following reasons:

1. The cause is a proceeding in equity under section 16 of the act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, brought by appellee in the Circuit Court of the United States for the Southern District of New York to enjoin the enforcement of an order of the appellant against the appellee, made under and by virtue of the provisions of said act.

2. Appellant, on June 24, 1908, after a hearing before it upon complaint, made an order requiring

appellee (defe before the Commission) to construct, on or before September 1, 1908, and maintain and operate thereafter during the period of not less than two years, a switch connection for the transfer of traffic between the line of appellee and the Rahway Valley Railroad Company in the town of Summit, N. J., the expense of such connection to be borne by the Rahway Valley Railroad Company.

On August 7, 1908, appellee herein filed its bill of complaint praying for an injunction against the Commission to restrain the enforcement of said order. The Circuit Court for the Southern District of New York, after a hearing upon application for a preliminary injunction, enjoined the order of the Commission on the ground that the Commission was without jurisdiction to make the order complained of in that the complainant before the Commission, the Rahway Valley Railroad Company, was not permitted by the statute to make complaint to the Commission. From that order of the Circuit Court the Commission appeals to this court.

3. A speedy determination of the lawfulness of the Commission's order requiring said switch connection to be made is a matter of much public importance.

4. The act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, in section 16, makes the provisions of "An act to expedite the hearing and determination of suits in equity,"

and so forth, approved February 11, 1903, applicable to all such suits; and said section provides that cases of this character shall have in this court "priority in hearing and determination over all other causes except criminal causes."

LLOYD W. BOWERS,
*Solicitor-General.*

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# Supreme Court of the United States

**OCTOBER TERM, 1909**

**No. 362**

INTERSTATE COMMERCE COMMISSION,

APPELLANT,

*Against*

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

---

MEMORANDUM OF PROCEEDINGS IN THE SENATE ON ADOPTION OF THE CLAUSE.

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The following amendment was proposed by Senator Elkins and adopted on May 9, 1906, in Committee of the Whole (Page 6761 of the Record):

> Mr. Elkins. I offer an amendment to come in after Section 1.
>
> The Vice-President. The Senator from West Virginia proposes an amendment, which will be stated.
>
> The Secretary. It is proposed to insert at the end of Section 1 the following:
>
> Any common carrier subject to the provisions of this act shall promptly, upon application of any shipper tendering interstate traffic for transportation, construct, maintain, and operate upon reasonable

terms a switch connection with any private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.

The Vice-President. The question is on agreeing to the amendment which has just been read.

The amendment was agreed to.

The following amendment, however, offered by Senator Elkins was on the same day rejected (Page 6762 of the Record):

Mr. Elkins. I offer an amendment, found on page 161 of the printed amendments.

The Vice-President. The amendment will be read.

The Secretary. Add the following as a separate paragraph at the end of Section 1, after the amendments already agreed to at that place:

That any common carrier subject to the provisions of this act shall promptly, upon application of any connecting lateral or branch line, and upon reasonable terms, make connections and fair, just, and reasonable prorating arrangements and division of joint or through rates with such connecting branch or lateral lines.

On May 17 the amendment adopted in Committee of the Whole was concurred in in the Senate and further amended as follows (Page 7225 of the Record):

The President pro tempore. The question is on concurring in the amendment.

Mr. La Follette. I offer an amendment to that amendment.

The President pro tempore. The amendment to the amendment will be stated.

The Secretary. In Section 1, page 6, after line 20, in the amendment already read, it is proposed to add the following:

> If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in Section 13 of this act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in Section 15 of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission other than orders for the payment of money.

Mr. La Follette. Mr. President, the amendment to which I propose the amendment read by the Secretary is, I think, an important one, and if it is important, it certainly is worth while to add to it an enforcing provision. Such a provision is absent from the amendment under consideration. All that my amendment proposes to do is to provide for the enforcement of the amendment heretofore adopted by the Senate. * * * The amendment which I have offered is not a penalty provision at all. It is simply an enforcing provision, without which the paragraph is defective. I know the view that is entertained by the Commission with respect to that paragraph—that it would be inoperative unless such a provision be added to it.

Mr. Nelson. I think the Senator from Wisconsin (Mr. La Follette) is right. His amendment is needed in order to give force and effect to what may be called

"the switch amendment" of the Senator from West Virginia (Mr. Elkins). The amendment of the Senator from Wisconsin gives the Interstate Commerce Commission power directly to act in the premises, and I think the amendment of the Senator from West Virginia is incomplete without the amendment of the Senator from Wisconsin. I think the amendment to the amendment ought to be adopted.

Mr. President, pro tempore. The question is on the amendment of the Senator from Wisconsin to the amendment.

The amendment to the amendment was agreed to.

The amendment made as in Committee of the Whole as amended was concurred in.

The bill was sent to conference amended as above noted.

The provision in question was further amended in the Committee of Conference as follows (Page 7963 of the Record):

Amendment Number 6: That the House recede from its disagreement to the amendment of the Senate numbered 6, and agree to the same with amendments as follows: In line 2 strike out "shall promptly"; in line 2, after "of," insert "any lateral, branch line of railroad, or of"; in line 3, after "transportation," insert "shall"; in line 5, after "any," insert "such lateral, branch line of railroad, or"; and the Senate agree to the same.

When the conference report came up in the Senate the following took place (Pages 8158 and 8159 of the Record):

Mr. Spooner. Now, Mr. President, I pass for a moment from that to another provision in this conference report. It has been criticised as beyond the power of the conference committee. I do not think that is a just criticism. It is to be found on pages 6 and 7 of the conference report. As we passed it it provided that—

> Any common carrier subject to the provisions of this act shall promptly, upon application of any shipper tendering interstate traffic for transportation, construct, maintain and operate upon reasonable terms a switch connection with any private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same.

The conference committee inserted "any lateral, branch line of railroad, or of." Then follow the words: "Any shipper tendering interstate traffic for transportation." That is all qualified by the language before that in the section. It deals with *precisely the same subject*. It simply enlarges the class so as to take in the lateral branch lines of railroads with the shipper. I think it was open to that modification and that the committee of conference did not exceed its authority in incorporating it.

Moreover, Mr. President, I think it is a wise provision to incorporate in the bill. I think—and I have had in my life some opportunity to form an accurate opinion about it—it is a very important provision. Many times I have known short lines of railroad connecting with a trunk line or a long line of railroad, constructed for some special purpose and a common carrier.

I fancy that my friend from Minnesota (Mr. Clapp) has known of the same thing—to carry lumber, if you please, or some other commodity to reach raw materials to be developed into finished products and find somewhere a market. But, Mr. President, it has very often happened that the men who put their money into the construction of such railroads have found themselves at one end of it practically in a pocket. They would be denied connections and prorating upon any fair basis. They have been frozen out repeatedly of their ownership because of the impossibility of operating under the unfair restrictions, and have been ob-

liged in the end to sell their railroads at a great loss to the single company with whose road they were connected. * * *

Now, Mr. President, continuing for just a moment; and my time has been taken up by interruptions—is it a wise provision? It is a provision without which the construction of hundreds of lateral lines, which would have been in the interest of the people, has been discouraged during all the years, for the reason that men did not dare to invest their money in the construction of lateral roads when there was no means whatever of securing fair treatment at that end of it which connects with a trunk line, if I may so speak of the railroad upon which they depended to get to a market. It has been a discouragement to the construction of lines which ought to have been constructed. There is no good reason why a railway carrier engaged in interstate commerce should be required to make a private switch with the private track of a shipper who is proposing to tender traffic and that a lateral railroad which tenders traffic in vastly greater volume and affecting beneficially large numbers of people and sections of the State or Territory should not have the same right.

Mr. Hale. What is the significance actually and practically, different from a switch of the words "a lateral railroad?"

Mr. Spooner. A lateral railroad is built from the side. It may be 20 miles; it may be 10 miles; it may be 50 miles; it may be 100 miles.

Mr. Hale. But it is an independent line?

Mr. Spooner. Certainly.

Mr. Hale. It is only associated with the trunk line by physical connection?

Mr. Spooner. It is associated with the trunk line in this, that it brings the trunk line business.

Mr. Hale. It is an independent organization.

Mr. Spooner. Certainly. *It is not a competitor;* only a feeder.

Mr. Hale. It is a feeder?

Mr. Spooner. That is all.

Mr. Hale. And it is only associated with the trunk line by its connection which brings business?

Mr. Spooner. That is all.

Mr. Elkins. It is a switch connection.

Mr. Hale. The Senator from West Virginia says it is a switch connection. It is more than that.

Mr. Elkins. It has to be a switch connection.

Mr. Spooner. To state it shortly, it is such connection as will enable the transfer of cars from one to the other interchangeably.

Mr. Hale. But it is not what we commonly understand by a switch connection of short lines of the road itself; it is independent.

Mr. Spooner. It is independent.

Mr. Hale. It is not a switch connection.

Mr. Spooner. A firm, a coal company, or a group of independent coal-mining companies are unable to get cars, they are unable to obtain switches, they are unable to connect with the line upon which they are dependent to get to market, and they may organize a little company and build 10 miles or 20 miles of railroad. Of course it is a common carrier; it has to be. Constructing that road to a connection with the long line engaged in interstate commerce, there is every reason in the world why, upon fair terms, it should be permitted to connect with that railroad, so as to be able to secure an interchange of traffic and cars on fair terms.

Mr. Hale. Through transportation.

Mr. Spooner. Certainly. Now, that is all this is. It will apply and be of great value in respect to coal production; it will apply and be of great value in respect of lumber production, and it will apply and be of great value for very many purposes which I need not take the time to go over. This is very important in many ways to the public, and is perfectly competent for the conferees to agree to.

No. 363.

# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

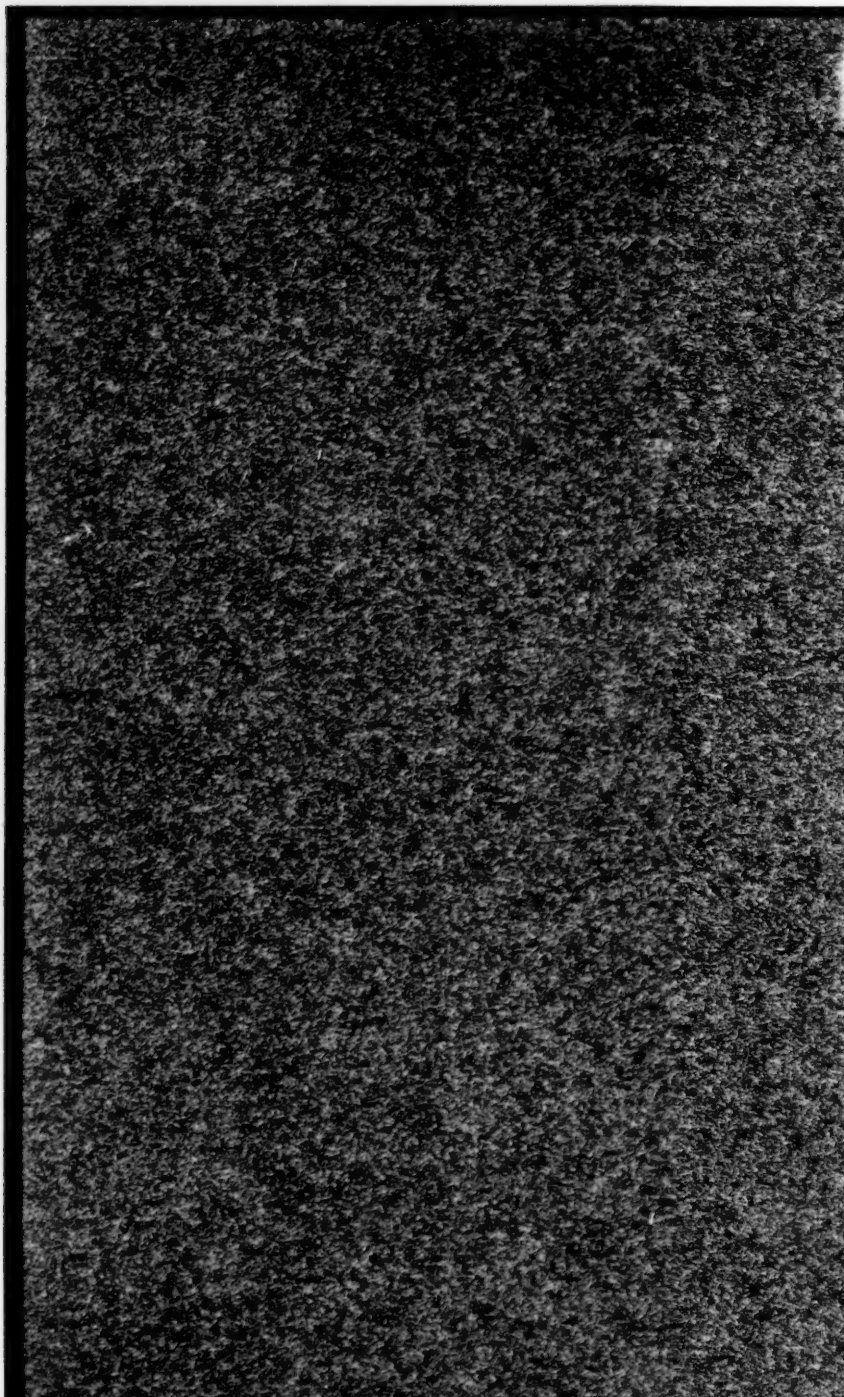
THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

v.

THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION,
APPELLANT.



# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE INTERSTATE COMMERCE COMMISSION, Appellant,
*v.*
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company.
No. 362.

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

## BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, APPELLANT.

### STATEMENT.

This is a suit brought to enjoin the enforcement of an order of the Interstate Commerce Commission (hereinafter called the "Commission") requiring appellee to permit the Rahway Valley Railroad Company (hereinafter called the "Rahway Company") to make a track connection with the railway of said appellee at Summit, N. J. Section 1 of the act to regulate commerce, as amended June 26, 1906 (34 Stat., 584, ch. 3591), provides that:

> Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any

> shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; * * *.

Section 3 of the same act provides:

> Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, * * *. (24 Stat., 380.)

In regard to the enforcement of the specific duty imposed by section 1, that section provides:

> If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this act, directing the common carrier to

> comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

The general power of the Commission to enforce the duties and obligations imposed by the act to regulate commerce are found in sections 12, 13, and 14 of that act, which provide, respectively:

> That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; *and the Commission is hereby authorized and required to execute and enforce the provisions of this act;* * * *. (Sec. 12, 26 Stat., 743.)
>
> That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; * * *

And thereupon the Commission shall—

> investigate the matters complained of in such manner and by such means as it shall deem proper. (Sec. 13, 24 Stat., 383.)
>
> That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its *decision, order, or requirement in the premises:* * * *. (Sec. 14, 34 Stat., 589.)
>
> No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. (Sec. 13, 24 Stat., 384.)

The Commission ordered appellee to permit the stated connection after a full hearing had at the instance and upon complaint of said Rahway Company. Thereupon this bill was filed.

Appellee operates two substantially parallel lines between Hoboken, N. J., and Denville, N. J. (Rec., 4), one of which, the more northerly, is known as the "Boonton Branch," the other being known as the "Morris and Essex division." The latter line passes through Summit, N. J., and is the one with which the Rahway Company seeks connection.

The railroad of the Rahway Company is about 10 miles long, and extends in a southeasterly direction from a point adjacent to the right of way of appellee in Summit, N. J., to Aldene, N. J., where it connects with the Central Railroad of New Jersey. It also has a spur about three-fourths of a mile long at its southerly end, extending to a connection with the

Lehigh Valley Railroad Company at Roselle, N. J. (Rec., 7).

Appellee's objection to the connection arises, as is alleged, from the fact that the Morris and Essex division is essentially a passenger line; that the territory traversed by it is thickly populated suburban country; that the passenger traffic on it is already so heavy and difficult to handle that the policy of diverting all possible freight to the Boonton Branch was long ago adopted and has been consistently adhered to ever since; and that the making of the connection will add to the "difficulties and dangers" already experienced in handling the traffic on said Morris and Essex division. In other words, the theory of the bill is that the connection is impracticable and unsafe, not because the place of connection is inappropriate, or because there are any physical difficulties in the way of its safe construction and operation, but merely because the handling of additional traffic would entail some additional switching on *regular switch tracks* and the hauling of some additional cars in *regular freight trains;* for the connection is proposed to be made with an existing side track on appellee's station grounds at Summit, and is entirely feasible so far as physical conditions are concerned; and the bill alleges that appellee now operates two freight trains daily in each direction over said Morris and Essex division. (Rec., 6.) Further, the assertion is that the Railway Company would not deliver more than 50 carloads of freight per annum. (Rec., 7). It is

difficult, therefore, to resist the conclusion that appellee is unduly worried about the consequences to it of the Rahway Company's connection.

After setting out these objections, the bill proceeds next to allege that the Rahway Company is not a "lateral, branch line of railroad" within the meaning of said section 1, but is a common carrier like appellee, and hence is not entitled to the benefit of said section. Finally, it is averred that the Commission had no jurisdiction to entertain the complaint of the Rahway Company, because the latter is not a shipper over appellee's line.

A motion for a preliminary injunction was made, and affidavits were filed in support of the various allegations of the bill. The motion was allowed, and a preliminary injunction was issued restraining the enforcement of the Commission's order until the final determination of the cause. (Rec., 43.) But it appears from the opinion of the court (Rec., 40–41) that the ground upon which the preliminary injunction was granted was only that the Commission had no jurisdiction to make the order upon complaint of a lateral, branch line of railroad; so that the preliminary injunction amounts practically to a final disposition of the case, without regard to the merits of the controversy.

Proper certificate was filed by the Attorney-General under the provisions of the so-called "expediting act" of February 11, 1903 (32 Stat., 823, ch. 544), and the case was heard before Lacombe, Ward, and Noyes, circuit judges, as provided in that act, which is made

applicable to suits of this character by section 16 of the act to regulate commerce, as amended June 29, 1906 (34 Stat., 584, ch. 3591). This appeal is taken pursuant to the proviso of said section 16, which reads as follows (p. 592):

> An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States.

## ASSIGNMENT OF ERRORS.

The errors relied on in this brief are: (1) That the Circuit Court erred in holding that the Commission had no jurisdiction to entertain the complaint by the Rahway Company; (2) that the Circuit Court erred in granting the preliminary injunction.

## ARGUMENT.

The argument in support of these assignments of error will be:

I. Congress had power to require connecting tracks to be installed.

II. The Rahway Valley Railroad Company is, with respect to appellee, a "lateral, branch line of railroad" within the meaning of section 1 of the act to regulate commerce, as amended.

III. But if a railway is not a lateral branch line, it is entitled to a connection in a proper case under section 3 of the act to regulate commerce.

IV. Whether the Rahway Company's right to a connection is based on section 1 or on section 3, the Commission had jurisdiction to hear and decide the

controversy under sections 12, 13, and 14 of the act to regulate commerce; and it also had that power under section 15 of the act.

V. The Commission having power to decide in this proceeding whether the circumstances justify a connection between the tracks of appellee and of the Rahway Company, the propriety of its decision on the facts can not be reviewed by the courts, for there certainly has been no unreasonable or palpably abusive exercise of the Commission's power.

VI. The bill and affidavits filed in support of it fail to show a case for relief on the merits.

Concerning these:

I.

**Congress had power to require connecting tracks to be installed.**

In the case of *Wisconsin, Minnesota & Pacific Railroad Company* v. *Jacobson* (179 U. S., 287) it was held that a statute of the State of Minnesota requiring common carriers to provide "at all points of connection, crossing or intersection at grade, where it is practicable and necessary for the interests of traffic," track connections for transferring cars between their respective lines, is not repugnant to those provisions of the Federal Constitution prohibiting the denial of due process or requiring the equal protection of the laws or guaranteeing liberty of contract. It was said in that case that the only question under such a statute is whether in the particular case the power to regulate the business of the carrier has been duly exercised.

That decision is necessarily decisive of the constitutionality of the Federal law here involved, for the power of Congress to regulate interstate commerce is as broad in its scope as the power of the States in the regulation of their internal commerce.

## II.

**The Rahway Valley Railroad Company is, with respect to appellee, a "lateral, branch line of railroad" within the meaning of section 1 of the act to regulate commerce, as amended.**

1. Ordinarily the term "lateral line," or "branch line," refers to a railroad owned by the same company which owns the main or trunk line to which the first line is lateral or of which it is a branch, but section 1 can not contemplate such common ownership because—

(*a*) It would be absurd to suppose that Congress intended to legislate only concerning connections between different lines belonging to the same company. In the first place, such legislation would be unnecessary. The proprietary company's own interests would require a connection between the two lines. On the other hand, legislation requiring a connection between two independent lines of railroad is necessary, because, for various reasons, one of the roads may not consider the connection desirable. In the second place, one line of railroad can hardly be considered a lateral branch of another line of railroad, owned by the same person or corporation, unless the two lines of railroad are connected.

(*b*) If the point be otherwise debatable, all doubt is removed by the fact that the connection is only to be made after *application for it* by the branch line. If the two lines were owned by one company, such an application would be impossible.

2. Since the lateral road must be independent in point of ownership from the road with which the connection is desired, the term "lateral, branch line of railroad" must mean either (*a*) a railroad of such length and so situated that shipments by or to its patrons must ordinarily move over another line, or (*b*) any railroad which is not a parallel and competing line.

(*a*) The terms "lateral railroads" and "branch railroads" most frequently occur in condemnation law. They are used to distinguish between mere spurs and sidetracks, which are necessary facilities to aid in the operation of the main line, and tracks which are not necessary to the operation of the main line, but are built as feeders and outlets of the main line. (*C. and E. I. Railroad Company* v. *Wiltse*, 116 Ill., 449.) The distinction between the two kinds of tracks arises through the fact that ordinarily railroads have not power to condemn land for the purpose of constructing tracks unless they are necessary to aid in the operation of the main line. Ordinarily, therefore, the term "lateral railroad" implies a line which serves as a feeder or outlet (or both) to another main or trunk line.

(*b*) But when it is remembered that the statute is dealing with independently owned railroads it is

hardly accurate to say that one can be regarded as a mere feeder or outlet of the other, at least until they are connected. The more rational view, therefore, would seem to be that any railroad which is not a parallel and competing line is to be considered a lateral branch line. And this accords with the general policy of the act to conserve the interests of the shippers, not only in the matter of rates, but also in the matter of facilities for transportation. Further than that, unless the broader construction is adopted, countless controversies will arise, as in this case, over the question whether or not a given railroad can be considered a feeder to another railroad; and such controversies will be difficult to decide.

3. It makes little difference in this case, however, which test is applied. The Railway Company's road is only 10 miles long. The bill alleges that practically no local business is done on it. (Division 5 of the bill of complaint, Rec. 7.) Practically its only function is that of a feeder to other railroads. Nor can the fact that it is already connected with the Lehigh Valley and Central railroads change its character as a feeder to appellee. It is true that the bill alleges (Division 5, Rec. 7) that nearly all the freight handled over the Railway Company's road now moves via the Lehigh Valley and Central railroads, but that is merely the natural result of the fact that there are connections with those roads so that through shipments can be made by way of them. On the other hand, the findings which are made exhibits to the bill, and which in this respect

are not denied by the bill, show that, notwithstanding the lack of a connection with appellee's road, "some of the industries on the Rahway Valley road have found it to their advantage to route their freight over the Lackawanna line, even at the expense to themselves of making transfer at Summit by wagon," and "that the uncontradicted testimony of the complainant's witnesses was that this connection would furnish at least 50 carloads of traffic a year at the present time, with the prospect of a greater volume of tonnage as the direct connection to the west over the Lackawanna becomes of value to the industries upon the Rahway Valley line" (Rec. 16). Further than that, the bill alleges that the Rahway Company was organized originally to build a road from Kenilworth north to Summit, and that the line from Kenilworth south to Roselle and Aldene was afterwards acquired by consolidation (Rec. 7). This fact clearly shows that the Rahway Company was not originally organized or constructed as a feeder or outlet for the Lehigh Valley or Central Railroad, neither of which runs through Kenilworth. It does more. It raises a presumption that the Rahway line was originally constructed merely as a feeder and outlet to appellee, for appellee's line is the only one which it could so serve, and it would be ridiculous to suppose that the Rahway line, with less than 10 miles of track, could be anything but a branch of some longer one. And this presumption is made practically conclusive by the allegation that—

> From the time the defendant railroad [the Railway Company] *commenced the construction of that portion of its line from Kenilworth to Summit* [i. e., the line it was chartered to build], the officials of your orator [appellee] *discouraged the idea of a physical connection with its line.* (Division 6 of bill, Rec., 8.)

This shows that the Railway Company must have sought the connection from the very start. True, the bill also alleges that the first "official" request for the connection was made in October, 1906, but this is tantamount to an admission that an *unofficial* request was made prior to that time, which doubtless caused appellee to "discourage" the idea of a connection. Further, by "official request" the bill must mean a request made pursuant to the statute, and such request could not have been made prior to June 29, 1906, the date on which the act went into effect. The bill also alleges that the Railway Company's line as originally constructed in 1904-5 ended at the south side of Park avenue and was not extended across that street to appellee's right of way until the fall of 1906, but this is unimportant because, in the first place, a glance at the map, Exhibit A, shows that the track extending to Park avenue was obviously designed as a connecting track with appellee, as the Railway Company's terminal station and facilities are all to the east of this track, and the construction of this spur to Park avenue can only be explained, therefore, on the theory that it was designed as a connection with appellee's road; and,

in the second place, the delay in extending the track across Park avenue, involving as it did the construction of a bridge and fill, might well have been due to appellee's attitude toward the connection. Why should this additional heavy expense be incurred by a road admittedly in financial straits so long as there was no prospect of getting the connection which was its only justification? On the other hand, the bill shows that the track was promptly extended as soon as the amendment to the commerce act gave reasonable assurance that the desired connection could be had. It is impossible to successfully contend, therefore, that the Rahway Company's line was not constructed as or is not in fact a lateral branch line of railroad with respect to appellee within the meaning of the statute.

It is equally clear that the Rahway Company is not a parallel and competing line. This is not only obvious from the physical location of the Rahway Company's line, but is, in terms, asserted by the bill. Thus, division 6 of the bill alleges that if the order now before the court is enforced appellee will be "compelled to assume the burden of freight traffic from the line of defendant railroad company, *a traffic not naturally tributary to your orator's railroad*" (Rec., 8). And division 7 of the bill alleges that it was not the intention of Congress to force a physical connection with such line as the Rahway Company and thereby to "foist" upon appellee "the burden of undesirable traffic *not naturally belonging to it*" (Rec., 10).

4. The suggestion in division 7 of the bill (Rec., 9, 10) "that it was not the intent of Congress in the use of the words 'lateral, branch line of railroad' to include such a railroad as is the defendant railroad—a common carrier of persons and property generally, serving the public generally in competition with your orator, and not an adjunct of, connected with, or related to any shipping interests, except as a common carrier," is without merit; for (passing over the allegation that the Rahway Company serves the public "in competition" with appellee; which is utterly inconsistent with the allegations that the traffic handled by the Rahway Company does not naturally belong to appellee, and must therefore be disregarded under the rule that the pleadings are to be construed against the pleader in cases of repugnancy and ambiguity) the suggestion disregards the plain purpose of Congress to require a connection with a railroad not a mere adjunct of, or related to, any shipping interest. The latter sort of railroad would unquestionably be a private side track within the meaning of that part of section 1 which requires a connection with a private side track constructed to connect with the common carrier's railroad. In making provision for a connection with and upon the request of a lateral branch railroad, on the one hand, and with a private side track upon the request of a shipper, on the other hand, Congress evidenced clearly an intention to require the connection whether the track is public or private. If this were not so, the right to a connection would depend altogether upon the owner-

ship of the stock of the company operating the lateral road and not upon the character of the railroad itself. So that though a company was authorized by its charter to carry on the general business of a common carrier, it would nevertheless be entitled to the connection if its stock were owned by a shipper or group of shippers; but if its stock were owned by others than shippers it would not be entitled to such connection. It is a matter of common knowledge that the so-called "industrial railroads" frequently, if not generally, possess all powers of the ordinary common carrier and are subject to all the liabilities and responsibilities of common carriers. It would be ridiculous to require connections with such railroads and to refuse them to railroads in all respects similar save in the matter of stock ownership.

III.

**But if a railway is not a lateral branch line, it is entitled to a connection in a proper case under section 3 of the act to regulate commerce.**

That section provides:

> Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith * * *. (24 Stat., 380.)

The connecting track is clearly not only a reasonable but a necessary facility for the interchange of freight between common carriers. Without it, carload shipments can not be interchanged except by the slow, inconvenient, costly, and wholly inadequate process of transferring the shipment from one road to the other by team. Further than that, the necessity for track connections between the lines of common carriers, neither of which can be considered a feeder to the other, is even greater than the necessity for connections between a mere feeding line and the trunk line, because more shippers need the connection in the first case. Besides, the specific provision for connections in section 1, as now amended, makes clear the policy of Congress to further the prompt and effective interchange of traffic in every possible way. If, therefore, the term "lateral, branch line of railroad," as used in section 1, is construed to mean only a line which can properly be considered a mere feeder to another longer line, a connection with any common carrier which is not a lateral line is clearly required by section 3, because it is inconceivable that Congress would *intentionally* limit the right of connection to the "feeder" line or private switch track when there was like and even greater necessity for trunk-line connections and when the obvious general purpose of Congress was to further the interchange of traffic in every way. *The only rational view is that if Congress had not regarded the case of trunk-line connections as already covered by section 3, it would have made the amendment to section 1 broad enough to include them.* It

results, accordingly, that the necessary effect of restricting the meaning of the term "lateral, branch line of railroad" must be to show that even if the application of section 3 to physical connections was ever doubtful, all doubt was removed by the failure to include trunk-line connections in section 1.

## IV.

**Whether the Railway Company's right to a connection is based on section 1 or on section 3, the Commission had jurisdiction to hear and decide the controversy under sections 12, 13, and 14 of the act to regulate commerce; and it also had that power under section 15 of the act.**

1. As to sections 12, 13, and 14 of the act:

Section 12 authorizes and requires the Commission "to execute and enforce the provisions of this act." Section 13 provides:

> That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts,

and makes it the duty of the Commission "to investigate the matters complained of in such manner and by such means as it shall deem proper." Section 14 provides:

> That whenever an investigation shall be made by said Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises, * * *.

These provisions confer general authority upon the Commission to hear complaints and make orders in respect to all violations of the act. Section 15 fully recognizes this through the provision that—

> The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this act. (34 Stat., 590.)

Accordingly, the particular complaint here involved was cognizable by the Commission unless the provision of section 1 that

> If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section 13 of this act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section 15 of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter

> provided for the enforcement of all other orders by the Commission, other than orders for the payment of money—

deprives the Commission of the power which it would otherwise possess to make orders upon complaint of any person interested. *Such construction of section 1 is, of course, to be avoided, under the general rule that different parts of a statute are to be reconciled, if possible.* It can be adopted only in the absence of any other reasonable explanation of the purpose of Congress in inserting the clause just quoted.

In passing, attention is called to the fact that this question can only arise if the Railway Company is "a lateral, branch line of railroad," for section 1 can not by any possible construction apply to cases arising under the provisions of section 3. If, therefore, the Railway Company should be held not to be a lateral branch road, with the result that its right to the track would have to be derived from section 3, the question now under consideration would not arise.

Reverting now to that question: Several important considerations show that the special provision regarding the shipper's remedy should not be construed as depriving the lateral road of a like remedy.

(*a*) The legislation is remedial, and consequently it should be liberally construed for the benefit of *those to whom rights are given.* The right to a connection under proper circumstances *is, in terms, conferred upon the lateral roads.* This is indisputable.

The provision is that "Any common carrier subject to * * * this act, upon application of any lateral, branch line of railroad, * * * shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad * * * where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." Whenever the conditions stated in the statute exist, the lateral line is entitled to the connection. The statutory *right* to the connection in no way depends upon action by the Commission. *The only function of that body is to enforce the statutory duty.* The act would be strange indeed, if, though giving to the lateral road the right to have and the right to make demand upon the trunk line for the connection, it could be construed to leave the lateral road without remedy in the case of a failure to secure the connection.

(*b*) Different parts of the same statute should always be construed in such manner as to render them harmonious, if possible. The construction adopted by the court below creates an absolute inconsistency between the general provisions of sections 12, 13, and 14 and the special provision of section 1 concerning remedies. By the first-mentioned sections the act purports to give to any person or corporation the right to complain to the Commission of *any* violation of the act, *even though the complainant has suffered no direct damage*. If special provision had not been made in section 1 for proceed-

ings by a shipper, the lateral road would undoubtedly have the right to proceed under sections 12, 13, and 14. A construction of section 1 which would deprive the lateral road of this right is therefore not only inconsistent with the general character of the act as a remedial statute, but also with the general remedial provisions of sections 12, 13, and 14.

(*c*) The reason for the insertion of the special provision concerning complaint by the shipper is simple and obvious. It is this: The special provision was intended to give to *shippers* the right to complain in the event of the refusal of the trunk line to accord the privilege of a connection *to the lateral line*. Without such special provision it would, to say the least, be very doubtful whether the shipper, even under the broad language of sections 12–14, would have power to make complaint to the Commission because the trunk line had refused a connection with a lateral line; but without such right in the shipper the statute would frequently be rendered futile, because, for many reasons, the lateral road might be unwilling to enforce its rights, in which event the real sufferer—the shipper—would be helpless. Many shippers are necessarily dependent upon the lateral roads for access to the trunk lines over which their shipments must ultimately move. The requirement concerning connections was enacted for their benefit. It was imperative that they have the power to enforce it in order to obtain that benefit. Section 1 accordingly specially authorized proceedings by them to enforce *the rights of the lateral road, as well as their*

*own*. This can not evidence any purpose on the part of Congress *to take from the lateral road a remedy for enforcement of its own right*.

(*d*) Although it is of vital importance to the shipper to be able to proceed himself when the lateral road fails to do so, it is equally important to him and to the public generally that the lateral road be able to proceed itself. In many cases if redress can not be had upon complaint of the lateral road, it practically can not be had at all, because no one shipper may have enough at stake to warrant his assumption of the entire burden of the litigation, and organization of or contribution by a number of shippers for such purpose would always be difficult and often ineffectual. The lateral road, on the other hand, is the fit and proper representative of all the shippers, and is in better position to conduct the litigation, both because of its greater familiarity with and information about the physical and traffic conditions and the necessities of all the shippers, and because, through its officers, who are specially skilled in their respective lines, its equipment for the purposes of litigation is the best and least expensive.

2. As to section 15 of the act

It was held in *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, No. 233 of the present term, that under this section 15 the Commission can make orders regulating carriers' practices, though they do not affect rates. The particular order involved in that case related to distribution of coal cars. And section 15 expressly allows orders under

it to be made "upon complaint of any common carrier."

It is apparent, therefore, that the lower court erred in holding that the Commission had no jurisdiction to enter the order in question upon complaint of the Rahway Company.

V.

**The Commission having power to decide in this proceeding whether the circumstances justify a connection between the tracks of appellee and of the Rahway Company, the propriety of its decision on the facts can not be reviewed by the courts, for there certainly has been no unreasonable or palpably abusive exercise of the Commission's power.**

The fact that the Commission's order is not plainly unreasonable in the circumstances of the case is obvious enough; but the details supporting that position will appear in the next point. With the utter unreasonableness of the order negatived, the lack of authority in the courts to set it aside is settled by *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, No. 233 of the present term.

VI.

**The bill and affidavits filed in support of it fail to show a case for relief on the merits.**

The conditions which entitle a lateral road to a connection under section 1 of the act are: (*a*) That the connection be reasonably practicable; (*b*) that it can be made with safety; and (*c*) that it will furnish

sufficient business to justify its construction and maintenance. The requirements of section 3 can be no greater. The propriety of the connection may therefore be tested by the requirements of section 1 as to lateral road connections, whether the right to the connection depends on that section or on section 3. Appellee not only has failed (1) to show that the statutory conditions do not exist, but it likewise has failed (2) to show any necessity for a preliminary injunction.

1. As to the showing with regard to the statutory conditions, respectively.

(*a*) *The practicability of the connection.*—Neither the bill nor any of the affidavits filed in support of the motion for preliminary injunction alleges that there is any engineering obstacle in the way of the connection. The theory of appellee is that the connection is not to be considered practicable, although made at a point where there are side tracks, switch engines, depot grounds, and all other facilities necessary for the interchange of freight, and although there are no engineering difficulties to overcome, if it will cause the trunk line any inconvenience; for all the allegations of the bill come only to this: That appellee is now doing an enormous passenger business over its Morris and Essex Division and has no great facilities for freight traffic, and therefore that it should not be burdened with 50 additional carloads of freight per year. The showing is therefore that the connection is no more impracticable than it would be to increase

the freight business done by appellee at Summit, N. J., to the extent of one carload a week. This showing is not sufficient, because—

First. The idea that Congress intended that the right of the lateral road to the connection should depend upon the *desirability* of the connection from the standpoint of the trunk line is repugnant to the act itself, because if the connection were desired by both roads no legislation whatever would be necessary. The act necessarily contemplates that for one or another reason of its own the trunk line is unwilling to permit the connection. Hence, to be impracticable in the statutory sense, the connection must not be merely inconvenient or troublesome to the trunk line.

Second. The bill alleges that appellee is a common carrier, and as a common carrier it is appellee's duty to receive and carry freight on every part of its railroad; it has no right to refuse to carry freight merely because it prefers passenger traffic. On the contrary, it must furnish all proper facilities and receive and carry all freight offered. The allegations to the effect that the Morris and Essex Division is essentially a passenger line are therefore wholly unimportant.

Third. Even if impracticability can be predicated upon traffic conditions and the inconvenience and difficulty of handling additional freight, still the bill fails to show any such conditions as make it impracticable for appellee to handle the additional

carload of freight per week which would result from the connection.

By reference to the map of appellee's station grounds at Summit, N. J., inserted at page 18 of the record, it will be seen that the connection is proposed to be made with a side track leading to a coal trestle at the eastern end of said station grounds. The total length of this side track is approximately 2,000 feet, measuring from its connection with the south main track at the point marked "1052+39.0" (called, in engineering parlance, "Station 1052+39.0," and meaning that that point is 105,239 feet distant from a base somewhere east of it, from which the length of the main track is measured). According to the bill, this side track and the two side tracks next south of it are used "almost entirely as sidings and storage tracks for passenger coaches and trains used and operated over the Passaic and Delaware branch * * * and for all other trains starting from or terminating at Summit." (Division 6, Rec., 8–9.) That is to say, these tracks are used for *switching purposes*, and it is therefore entirely appropriate to make the connection with one of these switch tracks. Further, some freight switching is done on them, as appears not only from the allegation that they are used "*almost* entirely" for passenger switching movements, but also from the fact that the track with which the connection is to be made leads to a coal trestle, obviously designed for and used as a place for the storage of coal. It would seem, too, that this coal trestle is situated outside

of appellee's right of way and upon the property of the Summit and Madison Ice Company, and is doubtless used in making delivery of coal to that concern. It is certain, therefore, that appellee now uses the side track with which the connection is proposed to be made, to some extent at least, for switching, storing, and delivering freight cars and traffic. And since that is so, it is impossible to conceive that the additional use of the track for the purpose of receiving less than one carload a week of freight from the Railway Company can materially or seriously alter the nature or extent of the use of such track. Indeed, the bill utterly fails to show that there is anything inappropriate in using the track in question in connection with the receipt of cars from the Railway Company. Much stress is laid on the fact that freight destined to or consigned from Summit is not taken out of the freight trains at Summit station but at West Summit yard, situated about 1½ miles west of Summit, and that in getting freight into and out of the West Summit yard it is necessary to cross from one main track to another. But the proposed connection can not in any way interfere with these operations. Appellee's freight yard at Summit is situated south of the three side tracks above mentioned, and west of the proposed point of connection. The tracks composing it lead from the main track at a point nearly 1,500 feet west of the proposed Railway Company's connection; and the movements, described with such detail, in getting freight to and from the West Summit yard, including the crossings of the main

track, must occur still farther west. It is impossible, therefore, that the proposed connection can in any way affect or interfere with the operations in the freight yard itself or between the freight yard and the West Summit yard. The only possible difficulty which appellee would encounter on account of the receipt of cars from the Railway Company would be precisely the same as that now experienced in getting cars to and from the coal trestle, above referred to, and into its freight yard. And this difficulty could not be great, in view of the small number of cars which would require such handling.

There is a statement in the bill that it is proposed to convert the side track with which the connection was ordered into a main track at some time in the near future, and it is alleged that when that is done the connection "would involve a facing-point switch on a main-line track, which is concededly dangerous and contrary to good railroad practice." Such might be the case; but if so, it is immaterial, because the Commission's order is expressly made "subject to modification at any time when said defendant so changes its tracks at Summit as to make such connection impracticable or unsafe," even though the change be made within the two-year period during which the connection is required to be made. There is no need of an injunction therefore at the present time, because of the stated possibility.

It must be remembered, too, that the making of the connection does not involve the placing of the Railway Company's cars upon appellee's side track

while awaiting handling by appellee. The cars can be left on the Rahway Company's track until appellee is ready to receive them. The only possible objection, therefore, to the use of appellee's tracks for the purposes for which they are now used would be that involved in the brief operation of switching the Rahway Company's cars from the point of connection to its freight yard, or to such other place as might be found most convenient, for the purpose of putting them with appellee's other outgoing freight. To sum up on this point: There is nothing in the bill to show that any difficulty of a new kind will be encountered by reason of the connection, but only that some fifty additional switching movements a year will be required to be made, all of which will be of precisely the same kind as, and probably will be made in connection with, the movements involved in delivering and taking away cars from the coal trestle above mentioned.

(*b*) *The danger of the connection.*—As to this the bill is silent, except for the general allegation that the dangers and difficulties of handling appellee's business at Summit will be increased by the necessity for handling additional traffic coming to it from the Rahway Company. In other words, the alleged danger consists in making on an average one additional switching movement a week over the stated track. If the statute can be construed to contemplate a danger of this nature at all, it is certainly impossible that the described danger is sufficient in extent to justify the refusal of the connection.

(c) *The insufficiency of the business offered by the connection.*—The bill charges, in general terms, that the connection "is justified neither by the amount of business to be therefrom derived by your orator nor by any advantage which will accrue therefrom to the shipping public." The first part of this allegation puts appellee in a curiously anomalous position. On the one hand its sole objection to the connection is that it is unable conveniently to handle any additional freight traffic, while on the other hand it asserts that the connection ought not to be permitted because it will not furnish a large amount of business, and therefore largely increase appellee's supposed difficulty. Apparently appellee cares little whether the amount of business furnished by the connection would be large or small. Its objection is equally strong in either case. The bill, in terms, alleges, however, that the connection will furnish 50 carloads of freight a year. (Division 5 of bill, Rec., 7.) The Commission found this amount of business sufficient to warrant it in ordering the connection. (Rec., 16.) The question whether or not the amount of business to be derived through the connection is sufficient to justify it must, of course, always be one of fact to be determined with reference to the particular circumstances of each case. It is important chiefly because of the cost of the connection. In this case, however, the order of the Commission requires the entire cost of the connection to be borne by the Railway Company. Appellee, therefore, can lose nothing through the making of the connection,

whether the amount of business derived from it should be large or small. Hence it is not in position to seriously urge this point, especially as the bill does not contain a single allegation showing, or tending to show, that appellee can suffer any loss whatever through the smallness of the amount of traffic delivered to it by the Rahway Company. On the contrary, if the allegations of the bill are to be believed, the less business appellee gets the better it will be pleased.

As to the allegation that the connection is not justified "by any advantage which will accrue therefrom to the shipping public," it is enough to say, first, that the statute does not require an affirmative showing that the shipping public will be benefited by the connection, and that such an advantage must be conclusively presumed from the fact that the bill alleges that shipments will be made by that route; and, second, that the allegations of the bill set up in support of this conclusion are wholly insufficient to warrant it. They are: (1) That no freight coming to or going from the Rahway Company's railroad originates at or is destined to points located exclusively on appellee's railroad, but this is obviously a mere guess; and even if it is true at present, the court can not presume that it will always be true. (2) That shipments going to or coming from points on the Rahway Company's railroad, when originating at or destined to points on appellee's railway, can be routed by way of either the Lehigh Valley Railroad or the Central Railroad; but such a route would be

extremely roundabout, with the result, according to the findings of the Commission (Rec., 16, 17), which are not denied by the bill, that "it has taken thirty days for a carload of freight to reach Kenilworth from Buffalo by one of the present connections of the Rahway Valley line;" so that "it would appear that the character of the service [i. e., the directness of the route] might be a matter of no inconsiderable moment to the shipper." (3) That the Rahway Company has joint rates and through routes with the Lehigh Valley and Central railroads and their various connections, so that "there would be no advantage to the shipper on the line of the Rahway Company were the said connections made." But this, as well as the allegation last mentioned above, is disposed of by the fact, as found by the Commission, that "it is undisputed that some of the industries on the Rahway Valley road have found it to their advantage to route their freight over the Lackawanna line, even at the expense to themselves of making transfer at Summit by wagon;" and also by the fact that the bill does not allege that the said through routes and joint rates are participated in by appellee. It must be remembered that the findings and order of the Commission are made parts of the bill of complaint, and that it appears from the bill, as well as from the findings themselves, that a full hearing was had before the Commission, at which all parties interested in the present suit were represented. These findings are therefore entitled to great consideration.

2. As to the necessity for interference by preliminary injunction: A preliminary injunction is never a matter of right. In granting or withholding it the court should always exercise a sound discretion; and where it appears that the status of the parties existing at the commencement of the suit will probably remain unchanged, or if changed can be effectually restored by the final decree, the injunction should be withheld.

*The injunction was not granted on the ground that the bill had made a sufficient showing on the merits of the case*, but solely on the ground, as appears from the opinion of the court, that the Commission was without jurisdiction in the premises, because the act to regulate commerce does not permit relief to be granted upon the application of a lateral branch road. Of course, if the decision of the lower court in this respect were sound, the temporary injunction would be eminently proper, but it has already been shown that the lower court misconstrued the statute in this respect and that the Commission did have jurisdiction to entertain and decide the complaint. This being so, the conclusions of the Commission certainly ought not to be disregarded before final decree, inasmuch as it is very clear that no irreparable injury can result to appellee through the enforcement of the order pending final hearing of the case. The connection must be made entirely at the cost of the Railway Company. When built, appellee will be obliged to incur no expense about it except as business may come to appellee through its installation, and for such expense it will be amply compensated

by the freight charges on the shipments. If after final hearing the court should determine that the Commission's view of the facts can not be considered reasonable, it then could decree removal of the connection by the Rahway Company, and upon such removal the status of the parties would be fully restored. Such removal would be entirely feasible. The case is not one in which the conditions proposed to be created would, when once established, be practically unchangeable and permanent.

Further than that, the bill nowhere alleges that appellee will suffer irreparable injury, or indeed any loss or damage whatsoever, by reason of the connection. On the other hand, the damage to the shippers along the line of the Rahway Company through the refusal of appellee to permit the connection is irreparable. Their shipments must be made now, if they can not make them by way of Summit, by some other route. To whatever extent they are damaged by the lack of proper facilities for interchange of freight with appellee at Summit they are irreparably damaged. They will have no recourse against appellee or anyone, if appellee's bill be ultimately dismissed. In such situation a preliminary injunction should not be granted.

CONCLUSION.

The order of the court below granting the preliminary injunction should be reversed and the cause remanded for further proceedings.

LLOYD W. BOWERS,
*Solicitor-General.*

FEBRUARY, 1910.

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FILED.
FEB 19 1910
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1909.

NO. 362.

INTERSTATE COMMERCE COMMISSION,
*Appellant,*

*against*

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

# BRIEF FOR DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

WILLIAM S. JENNEY,
*Of Counsel for Appellee.*

# Supreme Court of the United States,

| | |
|---|---|
| INTERSTATE COMMERCE COMMISSION, Appellant, against THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. | October Term, 1909. No. 362. |

## Statement of the Case.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, filed November 13, 1908, granting an injunction, *pendente lite*, restraining the enforcement of an order of the Interstate Commerce Commission, appellant (pp. 42-43).

The order of the Commission was made June 24, 1908, in the case of the Rahway Valley Railroad Company against The Delaware, Lackawanna and Western Railroad Company (p. 18).

The Rahway Valley Railroad is about ten miles long, extending from Aldene, New Jersey, where it has a connection with the Central Railroad of New Jersey, in a northerly and westerly direction, to Summit, New Jersey. It also has a branch about three quarters of a mile long at its southerly end,

connecting with the Lehigh Valley Railroad at Roselle, New Jersey.

It is a common carrier of freight and passengers, and in connection with the Central Railroad of New Jersey, and the Lehigh Valley Railroad Company, with which roads it has through routes and joint rates filed with the Interstate Commerce Commission, engages in interstate commerce.

Having built its road up to the line of the right of way of The Delaware, Lackawanna and Western Railroad Company at Summit, New Jersey, it filed a petition with the Interstate Commerce Commission, to compel The Delaware, Lackawanna and Western Railroad Company to construct a switch connection with it at that point. It based its right to such a connection upon that clause of Section 1 of the Act to Regulate Commerce, which reads as follows, and which we will hereafter refer to as the "clause" (Record, p. 11):

> "Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may

make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

The Commission after a hearing, ordered the connection to be made.

The Delaware, Lackawanna and Western Railroad Company, the appellee, thereupon filed its bill in equity in the Circuit Court of the United States for the Southern District of New York, against the Rahway Valley Railroad Company and the Interstate Commerce Commission, to set aside and annul the order of the Commission.

A motion was then made upon notice to the defendants in the action in the Circuit Court, for an injunction, *pendente lite*, restraining the enforcement of the said order.

The motion was made upon the bill of complaint filed in the case, and the affidavits served with the notice of motion (Record, p. 28). The motion was granted and the Commission appeals to this Court. No appeal was taken by the Rahway Company.

The Interstate Commerce Commission filed a demurrer to the bill of complaint in the action; and the Rahway Valley Railroad Company, after filing an answer withdrew the same, to file a demurrer, leave therefor having been duly granted in open

Court upon the hearing of the motion. No demurrer, however, was filed by it. Neither defendant filed answering affidavits. Although an answer of the Rahway Valley Railroad Company to the bill of complaint herein appears in the record at page 20, nevertheless, as above stated, that answer was withdrawn in open court, and the motion was heard and decided by the Court below upon the understanding that it was to be considered as submitted upon the bill of complaint and affidavits of the complainant and the demurrers of the defendants (Record, p 42, fol. 132).

The case, therefore, comes before this Court upon appeal with all the facts set forth in appellee's bill of complaint and affidavits admitted.

Reagan vs. Farmers L. & T. Co., 154 U. S., 362.

## POINTS.

**I. The Interstate Commerce Commission had no power or jurisdiction to make the order:**

**(a) Because the Rahway Valley Railroad Company is not a lateral branch line of railroad, within the meaning of the clause.**

**(b) Because by the clause the Commission is empowered to order a connection only upon complaint made by a shipper: and the Rahway Valley Railroad Company is not a shipper, within the meaning of the clause.**

**(c) Because the remedy provided for the enforcement of the right created by the clause, is confined to a proceeding before the Commission, instituted by a shipper: and that remedy is exclusive.**

### "A."

THE RAHWAY VALLEY RAILROAD COMPANY IS NOT A LATERAL BRANCH LINE OF RAILROAD WITHIN THE MEANING OF THE CLAUSE.

The clause in question requires a physical connection to be made by a common carrier, not with the railroad of another common carrier, but with a "lateral branch line of railroad." The Congress has been careful to use the limited term "lateral branch line of railroad," in contradistinction to the general term "common carrier," or "railroad of a common carrier," which it has uniformly

used in all other sections of the Act to Regulate Commerce, to refer to railroads generally. Evidently it must have intended to differentiate between the two. Clearly it did not intend to impose upon a common carrier, subject to the Act, the duty to make a physical connection, subject to the conditions specified in the clause, with the railroad of any other common carrier, one of whose termini adjoined its own road.

A construction of the clause which would fail to make a clear distinction between a lateral branch line of railroad and the railroad of a common carrier, as generally referred to in the Act, would involve a radical change of the common law rights and duties of carriers as between themselves, which can hardly be predicated upon the uncertain and restricted language used in the clause.

At common law the Courts could not compel a physical connection between two railroads.

> Wisconsin M. & P. R. Co. vs. Jacobson, 179 U. S., 288.

The Act to Regulate Commerce left common carriers free to exercise to their full extent, all the rights and privileges they had under the common law, so far as those rights and privileges and their exercise were not rendered unlawful by the provisions of that Act.

> Gamble Robinson Mfg. Co. vs. Chicago & N. W. R. Co., 168 Fed., 161.

And when it is asserted that the Act has created new rights or duties as between common carriers, considered apart from the interests of shippers, it must be shown that those rights and duties rest upon no uncertain language.

As Judge JACKSON, in the case of Kentucky and I. Bridge Company vs. Louisville and Nashville R. Co., 37 Fed., 567, has said:

> "The law should be as liberally construed in favor of commerce among the states as its language will permit; but, when complaint is made or relief is sought, solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred."

We submit, therefore, that had Congress intended to impose upon a common carrier subject to the Act, the obligation to make a physical connection with other roads without distinction as to whether they are lateral branch lines of railroad or such railroads as are generally referred to in the Act, that intention would have been unmistakably expressed. The words "any other common carrier," "railroad of any other common carrier," or some similar expression, would have been used instead of the peculiar and restricted term "lateral branch line of railroad."

What limitation then is to be placed upon the words "lateral branch line of railroad?" To what extent is such a line of railroad to be differentiated from the railroad of a common carrier, as referred to generally in the Act?

Bouvier defines a lateral railroad, as follows:

"A branch road. One running from some point on a main line intended as a connecting line or feeder."

In Newhall vs. Galena and C. U. R. Co., 15 Ill., 273, the Court said:

> "A lateral road is but another name for a branch road. Both must have a principle road from which they proceed. They are appendages to and are properly a part of the main line and must proceed from some part of the main trunk between its termini."

The term is defined in Blanton vs. Richmond F. & P. R. Co., 86 Va., 618; 10 S. E., 925, as follows:

> "According to Webster 'lateral' means proceeding from the side, as the lateral branches of a tree, lateral shoots; and this is the sense in which this word is to be understood when branch or lateral railroads are spoken of, and a lateral railroad is nothing more than an offshoot from the main line or stem."

In Goelet vs. Metropolitan Transit Company, 48 Hun (N. Y.), 520, the Court said:

> "So in the case at bar the defendant is authorized to construct a branch. This means that it shall be a branch of something, and if that something does not exist, then the branch cannot be called into being as a branch. If that which is to be a branch is built under such circumstances, it necessarily becomes the main structure."

Again in 33 Cyc., 120, the term is defined as follows:

> "A lateral railroad is an off-shoot from a main line, proceeding from some point on such line between its termini, and is but another name for a branch road. The term implies the existence of a main line, and that the branch shall be constructed from some point thereon."

Referring to the Standard Dictionary, we find the following definitions of the words "lateral" and "branch":

"Lateral—Of, pertaining to, proceeding from or directed toward the side."

"Branch—Diverging from or tributary to a trunk, stock, or main part."

All these definitions, and they are similar to those generally found in the cases and dictionaries, state that a lateral branch road is a part of or an off-shoot from a main line. This idea seems to be inherent in the word "branch." That word necessarily implies a main line of which the branch road forms a part.

In what sense, then, is the lateral branch road, referred to in the clause, to be considered a part of the main line? Certainly not in point of ownership or control. The purpose of the clause negatives any such idea. On the other hand there must clearly be some closer relation between the branch road and the main line than ordinarily exists between two independent railroads, which approach each other. The relation must include something more than the mere proximity of the terminus of one road to the line of the other. Otherwise one trunk line might well be held to be a lateral branch road with respect to another trunk line. We would have no sound distinction between a lateral branch railroad, and other railroads referred to generally in the Act; which is contrary to the conclusion, already reached, that such a distinction was clearly contemplated by Congress.

Nor can the length, importance, amount of business or extent of operation of one road as compared with another be the true test. That would be too indefinite and uncertain. No reasonable line of demarcation could possibly be drawn between a lateral branch road and any other railroad.

What other conceivable definition of a lateral branch railroad, as the term is used in the clause, can be adopted than that it is a line of railroad, naturally tributary to the line of the "Common Carrier" and dependent upon it for an outlet to the markets of the country?

In no other sense can one independent road be deemed a branch or part of another road. We thus give the ordinary and full meaning to the words "branch" and "lateral"; we make a reasonable distinction between a lateral branch line of railroad and other railroads, referred to generally in the Act; and we give full effect to the object which Congress desired to accomplish by this clause, as we shall show more fully under a following point, namely, to give shippers located upon isolated branch roads, having no connections, access to the various parts of the country.

If we are correct in our conclusion as to the meaning of the term "lateral branch line of railroad," it remains only to point out that the Rahway Valley Railroad is clearly not included in that term.

The Rahway Valley Railroad was originally constructed from Kenilworth to Aldene, New Jersey, with a branch, ¾ of a mile long, extending to Roselle, New Jersey, by the New Orange Four Junction Railroad Company for the purpose of serving shippers located at Kenilworth. That part of the road was acquired by the Rahway Valley Railroad Company by consolidation, effective March 1, 1905, of the Rahway Valley Railroad Company and the New Orange Four Junction Railroad Company. The construction of the part of the road from Kenilworth to Summit where it approaches the line of the appellee,

was begun at the Kenilworth end in September, 1904, and completed in the Fall of 1906 (Record p. 7).

The road has long had and now has a connection with two trunk lines of railroad, the Central Railroad of New Jersey at Aldene, and the Lehigh Valley at Roselle. The Central Railroad of New Jersey has a connection with the appellee's railroad at Hampton Junction, New Jersey, about forty miles northwesterly from Aldene, at Lake Junction, New Jersey, a very short distance farther north, at Phillipsburg, New Jersey, and at Scranton, Pennsylvania. The Lehigh Valley Railroad connects with the appellee's railroad at Phillispsburg, New Jersey. Shippers on the Rahway Valley Railroad are thus able to reach by these connections every point they could reach were the connection with the appellee's railroad at Summit made, as proposed (Record, pp. 7, 30).

The Rahway Valley Railroad has with the Central Railroad of New Jersey and the Lehigh Valley Railroad, and their various connections, through routes and joint rates, the New York rate applying upon its shipments (Record, pp. 7, 30).

It operates a through passenger service in connection with the Central Railroad of New Jersey from Summit to New York, as to which it is a competitor of the appellee (Record, p. 31).

It publishes and files tariffs with the Interstate Commerce Commission, in which the Central Railroad of New Jersey, and the Lehigh Valley Railroad Company with their various connections concur, and the Rahway Valley Railroad Company concurs in tariffs filed with the Commis-

sion by the Central Railroad of New Jersey, the Lehigh Valley Railroad Company and their connections. In these tariffs interstate rates both east and west, are quoted (Record, p. 31).

Practically all the shipments over its road originate at or are destined to Kenilworth. This place is only two and one-half miles from Aldene and two miles from Roselle. It is about eight miles from Summit (Record, pp. 7, 30).

At all times the appellee has discouraged the construction of the Rahway Valley Railroad with the idea that a connection of any kind would be made at Summit between it and appellee's railroad (Record, p. 8).

It appears, therefore, that the Rahway Valley Railroad Company is in no sense a branch or off-shoot of the appellee's railroad, nor naturally tributary to it nor dependent upon it for an outlet to any part of the country.

On the contrary, it is an independent common carrier, competing with the appellee both as to freight and passenger traffic.

It was built to connect with the Central Railroad of New Jersey and the Lehigh Valley Railroad. It opened up a territory naturally tributary to those roads, not to the appellee's railroad. The only shippers of importance with respect to the number or value of their shipments, which it now serves, are located at Kenilworth, two and one-half miles from the connection with the Central Railroad of New Jersey, and two miles from the connection with the Lehigh Valley Railroad, but about eight miles from the proposed connection with appellee's railroad. The two former roads, and not the appellee are properly chargeable with the duty of serving those shippers.

Nor is the proposed connection necessary to provide an outlet to any shippers along the Rahway Valley Railroad. That outlet already exists. They have adequate connections and satisfactory rates to all points in the country which they have any desire to reach, via the Central Railroad of New Jersey and the Lehigh Valley Railroad.

The Rahway Valley Railroad stands in the same relation to the appellee, as any other independent common carrier, the terminus of whose road adjoins or approaches that of the appellee. There is, we submit, no theory upon which it can qualify as a lateral branch line of railroad.

"B."

BY THE CLAUSE THE COMMISSION IS EMPOWERED TO ORDER A CONNECTION ONLY UPON COMPLAINT MADE BY A SHIPPER; AND THE RAHWAY VALLEY RAILROAD COMPANY IS NOT A SHIPPER, WITHIN THE MEANING OF THE CLAUSE.

The terms "shipper" and "lateral branch line of railroad," as used in the clause, speak for themselves. Congress has taken care to differentiate between them. They cannot be made synonymous or interchangeable, nor can one be made to include the other. They have distinct and different meanings, both to the popular and to the legal or technical mind.

If there be any doubt as to the meaning of these words or the intent with which they were used, it must be dispelled by that sentence of the clause which reads:

> "And shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper."

Can it be seriously argued that Congress intended by this provision, to so add to the common law obligations of a carrier, as to require it to furnish cars to the best of its ability to another carrier connecting or competing with it? The statement of the proposition carries its own refutation. And yet if the word "shipper," as used in the clause, includes a lateral branch line of railroad, such a conclusion necessarily results.

"C."

THE REMEDY PROVIDED FOR THE ENFORCEMENT OF THE RIGHT CREATED BY THE CLAUSE, IS CONFINED TO A PROCEEDING BEFORE THE COMMISSION, INSTITUTED BY A SHIPPER, AND THAT REMEDY IS EXCLUSIVE.

It is an elemental rule of statutory construction that when a right created by statute is coupled with a remedy or mode of procedure for the enforcement of the right, that remedy or mode of procedure is exclusive. The authorities in support of this principle are so numerous that we confine the citation of them to cases decided by this Court.

In Pollard vs. Bailey, 87 U. S., 520, in which the question presented was as to the liability of stockholders of a bank for debts of the corporation, the Court said:

> "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement.
>
> It was not only to be apportioned and collected, but the mode of apportionment and the manner of collection were specially provided for. The liability and the remedy were created by the same statute. This being so the

> remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone must be employed."

The reason for the rule is stated in the case of the Dollar Savings Bank vs. U. S., 86 U. S., 227, as follows:

> "The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefor, rests upon a presumed statutory prohibition. It applies and it is enforced when anyone, to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other."

And to the same effect are the following authorities:

> Wheaton vs. Peters, 8 Peters, 589.
> Farmers and Mechanics Nat. Bk. vs. Dearing, 91 U. S., 29.
> U. S. vs. Perryman, 100 U. S., 235.
> Fourth Nat. Bk. vs. Francklyn, 120 U. S., 747.
> Banks vs. Manchester, 128 U. S., 244.
> Thompson vs. Hubbard, 131 U. S., 123.

The application of this rule of construcion to the present case must be obvious. At common law a railroad company was not required to construct a spur track for a shipper located near its line, or to make a physical connection with another railroad.

> Jones vs. Newport News & M. V. Co., 65 Fed., 736.

Mercantile Trust Company vs. Columbus S. & H. R. Co., 90 Fed., 118.

Wis. M. & R. R. Co. vs. Jacobson, 179 U. S., 288.

The clause in question creates a new right unknown to the common law. It provides the remedy; and that remedy, we submit, under the authorities is exclusive.

The argument of the appellant, we understand, is that the statute creates a right in favor of the lateral branch line of railroad, as well as of the shipper; that the remedy given, being confined to the shipper, is inadequate to enforce the right created by the statute, in favor of the lateral branch line of railroad; that to enforce the latter right, therefore, the lateral branch road may resort to such other remedies as may be found in the Act to Regulate Commerce, for enforcing the general provisions of the Act. And our attention is called to Sections 12 and 13 of the Act, as providing the proper remedy.

We answer first that the rule of statutory construction above set forth is controlling and knows no such exception or qualification as the appellant would attach to it.

This precise question seems to have been determined adversely to the position taken by appellant in the following cases:

Durant vs. Supervisors of Albany County, 26 Wendell (N. Y.), 65.

Janney vs. Buell, 55 Alabama, 408.

City of Faribault vs. Misener, 20 Minn., 396.

We quote from Endlich on the Interpretation of Statutes, page 10:

> "When a statute in language clear, positive and direct, and leading to no absurdity, gives a suitable remedy for an existing evil, though an inadequate one, a construction which upon the ground of a supposed intention of the legislature to give a more effectual one, would undertake to enlarge the terms of the act would be unwarranted."

But if it were true, as a proposition of law, that when a specific remedy provided by a statute for the enforcement of a right created by the statute is inadequate for that purpose, the Courts may look to other remedies to enforce the right, nevertheless, we submit that such a rule of construction has no application to the present case, because the remedy provided by the clause in question is fully adequate to enforce the rights which the Legislature intended to create by that clause.

Congress gave to the shipper a right to a connection between a main line and a private side track or lateral branch line of railroad on which the shipper might be located. It provided a specific and adequate remedy to enforce that right. Did it likewise intend to confer the same right to a connection on a lateral branch line of railroad, considered apart from the interests of the shippers along that road? If so, it omitted to provide a specific remedy where we would naturally expect to find one.

We have here not a case of failure to accomplish a clearly defined object or to give effect to an unmistakable intent because of the use of loose, uncertain or ambiguous language. We have a plain case of omission.

We know of no rule of construction of statutes which will justify a Court in attributing an obvious omission in a statute to error rather than to design; unless, perhaps, the omission leads to an absurdity or contradiction which can be explained upon no other hypothesis. The Courts will not be inclined to ascribe error or mistake to a co-ordinate branch of the Government. The presumption must be that the Legislature acted advisedly, if not wisely. It must be presumed to have intended to omit just what it did in fact omit; as it is presumed to say and mean just what it does in fact say.

As Lord CAMPBELL, in Reg. vs. Treasury, 20 L. J. Q. B., 312, said:

> "The burden of proving that the legislature has fallen into a mistake is cast upon those who say so."

So in Jones vs. Smart, 1 T. R., 44, BULLER, J., said:

> "A *casus omissus* can in no case be supplied by a court of law for that would be to make laws."

And in U. S. vs. Goldenberg, 168 U. S., 95, this Court used the following language:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only

arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. *No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for justify any judicial addition to the language of the statute.*"

Now, if we are correct in assuming that the omission from the clause of a remedy in favor of the lateral branch line of railroad was made intentionally by Congress, what are the inferences rationally to be drawn from such omission?

Clearly they can be nothing else than that Congress intended that the lateral branch line of railroad should have no such remedy.

And if Congress denied the remedy, it must be because it did not intend by the clause to create for such branch road the right to compel a connection with another railroad. On no other theory can we account for the intentional omission in the clause of a remedy in favor of the lateral branch road.

If it be argued that Congres had no need to insert a remedy for the lateral branch road because an adequate remedy was provided by Sections 12 and 13 of the Act, then it may be asked why was it considered necessary to insert in the same clause a remedy for the shipper?

The Legislature created a right in favor of the shipper and coupled it with a remedy. If it had intended by the same clause to create a similar right in favor of the lateral branch road, surely it would have provided a remedy as it did for the shipper.

We submit, therefore, that the clause was inserted in the Act to Regulate Commerce solely in the interest of shippers. It was the intention of

Congress to require railroads to provide side track connections for shippers without discrimination, and to give an outlet to those shippers who, by reason of being located upon a branch road, were necessarily dependent for transportation facilities upon a connection between the branch road and a main line. Commissioner Lane, in his opinion in this case, before the Commission, seems to have adopted this view of the clause. Note his opinion at page 17 of the Record.

The shipper is the real party in interest. The right to a connection was created for him and for him alone. It was not intended that one railroad should have the right, solely in order to promote its own interests, and independent of the interests of shippers along its line, to impose the burden of a physical connection and undesired traffic upon another railroad. Congress was not concerned with the lateral branch road, except in so far as it represented the shippers along the road. As this Court said in the Express cases, 117 U. S., 1:

> "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them."

Accordingly, the shipper himself is required to make the complaint and prosecute the action to enforce the right created by the clause. This is in line with the general rule of law, that the real party in interest must appear in and prosecute an action.

Nor does it follow that, because the clause in defining the right requires the carrier to make the connection upon the application either of a lateral branch line of railroad, or of a shipper tendering interstate traffic, that a right is created in favor

of the lateral branch road as well as the shipper. A more reasonable interpretation is that Congress in directing the carrier to make the connection upon the application either of a lateral branch road or a shipper, contemplated that the application might be made by a branch road as agent for and in the interest of the shippers along that road. The preliminary application might very well proceed either from the shipper or from the branch road representing the shipper, which would presumably be in closer business relations with the main line than the shipper himself.

This construction of the clause is in line with the construction generally given to the Act to Regulate Commerce. It has been repeatedly declared by the Commission and the Courts that the Act was passed primarily in the interest of shippers.

On the other hand, when a common carrier has sought to enforce as against another common carrier, a right alleged to have been created in its favor, by the Act, it has been required to point to clear and certain provisions of the Act creating that right. In the absence of express provisions in the Act to the contrary, and in so far as the interests of shippers have not been involved, common carriers have been left to carry on their business as at common law.

As Judge JACKSON in the case of Ky. & I. Bridge Co. vs. L. & N. R. R. Co., 37 Fed. Rep., 567, said:

> "The law was intended primarily, for the benefit of the interstate traffic rather than for the advantage of the designated common carriers engaged in its transportation; and the later, as the instrumentalities and agencies of commerce, can hardly assert rights and privileges under the statute, which could not be

> properly or lawfully claimed by such commerce itself. * * *
>
> The law should be as liberally construed in favor of commerce among the states as its language will permit; but when complaint is made or relief is sought solely or mainly in the interests of the common carriers engaged in the transportation of such commerce, the Act complained of or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred."

Again in Little Rock & M. R. R. Co. vs. St. P. & S. W. R. R. Co., 63 Fed. Rep., 781, the Circuit Court of Appeals, Eighth Circuit says:

> "Another necessary result of the doctrine contended for is that it deprives railway carriers in a great measure of the management and control of their own property, by destroying their right to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable. There ought to be a clear authority found in the statutes for depriving a carrier of this important right before the authority is exercised, for when questions of that nature have to be solved a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated."

And so we find that the Courts have in several cases held that the second paragraph of Section 3 of the Act, providing that carriers shall afford all reasonable, proper and equal facilities for the interchange of traffic, and forbidding discrimination between connecting lines, does not require a carrier to enter into an arrangement with a connecting carrier for through routing and joint rates, or for the use of its tracks and terminals, even

though it has made such arrangements with other connecting carriers where the physical facilities for the interchange of traffic are the same.

Ky. & I. B. Co. vs. L. & N. R. R. Co., 37 Fed. Rep., 567.

Ore. S. L. & U. N. R. R. Co. vs. N. Pac. R. R. Co., 61 Fed. Rep., 158.

L. R. & M. R. R. Co. vs. St. P. & S. W. R. R. Co., 63 Fed. Rep., 775.

St. L. Drayage Co. vs. L. & N. R. R. Co., 65 Fed. Rep., 39.

Gulf C. & S. F. R. R. Co. vs. Miami S. S. Co., 86 Fed. Rep., 407.

Cent. Stock Yds. Co. vs. L. & N. R. R. Co., 118 Fed. Rep., 113.

These cases, involving the construction of the second paragraph of Section 3 of the Act to Regulate Commerce, lead us to a brief consideration of that paragraph, as bearing upon the question under discussion. It reads as follows:

> "Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

This paragraph of Section 3, refers to common

carriers generally, as distinguished from the narrower term "lateral branch line of railroad." It undertakes to define the rights and duties of common carriers, considered as such and apart from the interests of shippers, with respect to the interchange of traffic between their respective lines. And it is the only provision of the Act to Regulate Commerce which does assume to regulate the relations between carriers, as carriers, with the exception of Section 5 relating to the pooling of freights.

It is important, then, to note that this paragraph not only does not require one carrier to make a physical connection with another carrier under any circumstances, but it contains an express proviso that it "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

> L. R. & M. R. Co. v. St. P. & S. W. R. Co., 59 Fed., 400, 63 Fed., 775.
>
> Oregon S. L. v. N. P. R. Co., 61 Fed., 158.

A physical connection between two railroads necessarily involves the use of the tracks and terminal facilities of each railroad by the other. In Oregon Short Line & U. N. R. R. Co. vs. Northern Pac. R. R. Co., *supra*, the Court said on this point:

> "Of course, if appellant's construction of section 3 be correct, and it can compel appellee to receive one car, by the same right it may compel the receipt of many, and what more would be necessary to take the use of its tracks? We think nothing. The attachment of the locomotive would only affect the

> degree of the use. The same conclusion was reached after a careful consideration of all the cases by the Circuit Court of the Eighth Circuit in Little Rock & M. R. Co. vs. St. Louis, I. M. & S. R. Co., 59 Fed., 108. A construction which permits the use of tracks we are forbidden to entertain."

In the Jacobson case, 179 U. S., 287, where a physical connection was ordered under a State statute expressly requiring it, this Court said:

> "At common law the courts would be without power to make such an order as was made in this case by the state court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind."

We have then an express provision in this paragraph, defining the rights and duties of carriers, as between themselves and apart from the interests of shippers, with respect to the interchange of traffic, that one carrier shall not be required to make a physical connection with another carrier.

We reach the conclusion, therefore, that it is the general policy and intent of Congress not to compel one carrier to make a physical connection with another carrier, in order to promote the interests of the latter carrier alone. And if this be true, what possible reason can be advanced, why Congress should differentiate between a common carrier, as generally referred to in the Act, and a lateral branch line of railroad, with respect to such a connection? Why should it give the latter a right to compel a physical connection with another railroad in its own interest and independent of the interests of shippers along the road, and deny the same right to the former?

Again, the Hepburn Act left Section 3 of the

Act to Regulate Commerce as it was. It amended Section 1 of the Act, however, by inserting a provision making it the duty of every carrier, subject to the Act, to establish through routes and just and reasonable rates applicable thereto, and Section 15 by inserting a provision empowering the Commission to establish through routes and joint rates, when the carriers complained of refused so to do. *But it expressly limited the Commission's power in this respect to cases where "no reasonable or satisfactory through route exists."*

These amendments were made in the light of judicial decisions, hereinbefore cited, denying absolutely the right of one carrier under the Act to compel another carrier to enter into an arrangement for a through route and joint rates. They must be taken, therefore, as a deliberate and well-considered expression of the thought of Congress on the subject.

We find, then, that Congress has not required carriers to join in through routes and joint rates, with a view to promoting the interests of the carriers themselves. Its purpose has been solely to provide through routes and joint rates for the shippers. If the shippers along the line of a carrier have one reasonable and satisfactory through route to a given territory, that carrier cannot compel another carrier to join with it in a through route to the same territory. And the term "carrier," of course, here includes a lateral branch line of railroad, which could assert a right to the establishment of a through route and joint rates with a connecting main line, only under the provisions of the Act, above mentioned, and subject to the conditions thereof.

We again call attention to that part of the clause which reads:

> "And shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper."

If it was the intention of Congress to require a carrier to make a connection with a lateral branch road in the interest of that road as well as in the interest of the shippers along the road, it would seem reasonable to expect that it would have been as solicitous with respect to the interests of the former as of the latter, and that it would have provided against discrimination in favor of or against the lateral branch railroad as well as the shipper.

## POINT II.

### The Court properly made the order appealed from because the Commission did not deny the allegations of the bill.

The bill alleges as follows:

> "7. And your orator further charges and avers that the said Interstate Commerce Commission had not the power or jurisdiction to make said order of June 24th, 1908.
>
> That said Rahway Valley Railroad Company is not, nor was it at the times herein mentioned a 'shipper'; nor is it or was it at the said times a 'lateral, branch line of railroad' within the intent and meaning of that clause of Section 1 of the Act to regulate Commerce as amended, which relates to construction and operation of switch connections; neither has there been any application by a shipper for a physical connection with your orator's railroad at Summit, nor any complaint by a shipper to said Commission of any failure to install or operate such connection, to the knowledge of your orator.

That it was not the intent of Congress in the use of the words 'lateral, branch line of railroad' to include such a railroad as is the defendant railroad—a common carrier of persons and property generally, serving the public generally in competition with your orator and not an adjunct of, connected with or related to any shipping interests, except as a common carrier. Nor was it the intent of Congress in enacting said clause to enable such a railroad, on its own initiative and application, to force a physical connection with another main line railroad and thereby foist upon the latter the burden of undesirable traffic not naturally belonging to it, to its disadvantage and embarrassment, and to the disadvantage of its other patrons who are of right entitled to the full enjoyment of its facilities. Nor was it the intent thereby to require any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business.

That said physical connection as ordered, cannot be made and operated with safety; that the same is impracticable in view of the situation hereinbefore shown; that it is justified neither by the amount of business to be therefrom derived by your orator nor by any advantage which will accrue therefrom to the shipping public."

While the foregoing doubtless contains many allegations which are conclusions, it nevertheless includes statements of fact with respect to the jurisdiction of the Commission both under the clause and otherwise, which if true would warrant the granting of the injunction. By its demurrer the Commission admits that all such facts are true, wherefor the order was properly made by the Court below.

## POINT III.

**The Interstate Commerce Commission adopted a wrong principle in reaching its conclusion, whereby it disregarded material facts that should have been considered by it.**

The Court below based its decision upon the ground that in the absence of a written application and complaint by a shipper the Commission was without power to make the order complained of (Record, p. 40).

We understand, however, that this Court is not confined to the ground assigned by the Court below for its decision. If the decree is correct, it will not be reversed on appeal because the Court below has based its decision upon erroneous or insufficient reasons.

> McClung vs. Sullivan, 19 U. S., 598.
> Pa. R. R. Co. vs. Wabash R. R. Co., 157 U. S., 225.

The question of fact as to whether the connection should be made in view of all the facts and circumstances is possibly one for the Commission to determine.

The question we now raise is rather one of law, and is similar to that presented to the Court in Texas & P. R. R. Co. vs. I. C. C., 162 U. S., 197. As we read the opinion in that case, it is an authority for the propositon that this Court will set aside an order of the Commission, if it appears that the Commission in making its decision excluded from its consideration facts that should have been considered by it. And to the same effect are:

East Tenn. V. & G. R. R. Co. vs. I. C. C., 181 U. S., 1.

L. & N. R. R. Co. vs. Behlmer, 175 U. S., 648.

The Commission in making its order in this case had to determine the question of the "justification therefor" of the connection.

The test it applied to this question is best stated in the words of Commissioner Lane:

> "It will be noticed that the law does not confer upon this Commission plenary discretion as to the advisability of such connection. The act declares that the connection shall be made under certain specified circumstances and conditions. It is not contemplated by the law that appeal to this Commission shall be necessary; but it is provided that in case a carrier does not comply with the duty imposed, complaint may be made by a shipper to the Commission, which shall have authority to make an order compelling the connection. * * *
>
> "The uncontradicted testimony of the complainants' witnesses was that this connection would furnish at least 50 carloads of traffic a year at the present time, with the prospect of a greater volume of tonnage as the direct connection to the west over the Lackawanna becomes of value to the industries upon the Rahway Valley line. *If this were an application for a side track to an industry, we should without question regard this volume of freight sufficient to justify the building and maintenance of a switch connection, and we see no other test which should be applied because this is a line of railroad reaching several industries.* It is true that the industries lying along this line have access to the markets generally through its southern connections, but it is undisputed that some of the

> industries on the Rahway Valley road have found it to their advantage to route their freight over the Lackawanna line, even at the expense to themselves of making transfer at Summit by wagon." (Record, p. 16.)

We submit that the case of an application by a lateral branch railroad or a shipper on that road for a switch connection with another railroad presents entirely different questions with regard to the justification for the connection than are presented in the case of an application by a shipper for a private side-track connection.

At common law a railroad company was required to provide adequate facilities for all shippers along its road, without undue or unreasonable discrimination (Atchison, etc., R. R. Co. vs Denver, etc., R. R. Co., 110 U. S., 667). This obligation was enlarged and strengthened by the Act to Regulate Commerce, and made to include the construction of side-track connections. A railroad company is, therefore, under a peculiar duty to the shippers along its own line. It cannot excuse its failure to furnish them with adequate facilities upon the ground that its own interests might thereby be adversely affected. Nor can it plead that the interests of any one shipper or class of shippers along its road require it to discriminate in their favor to the prejudice of another shipper or class of shippers along its road. All are entitled to equal facilities.

In the case of an application by a shipper for a private side-track connection, then, it would seem very proper that the conditions attached to the right should be narrowly construed. The principle, if not the only question presented with regard to the justification for the connection,

would be the amount of the revenue to be gained by the carrier therefrom, and its relation to the expense and inconvenience to the carrier involved in the connection. The broader questions of the effect of the connection upon the interests of the carrier or of other patrons of its road, we believe, would be properly excluded from consideration.

In the case of an application by a lateral branch road or a shipper thereon for a connection between that road and some main line of railroad, however, the inquiry as to the justification for the connection must necessarily take a much wider range. A carrier's duty to serve shippers located on the road of another carrier is subordinate to its duty to serve the shippers on its own line. (Traer vs. C. & A. R. R. Co., 13 I. C. R., 456). It is not required by the common law to make a connection with another railroad (Wisconsin M. & P. R. R. Co. vs. Jacobson, 179 U. S., 288). Nor is it required by the common law to carry except on its own line (Atchison, etc., R. R. Co. vs. Denver, etc., R. R. Co., 110 U. S., 667). Its duty under the common law is primarily to its own patrons, to the shippers and passengers in the territory naturally tributary to and dependent upon its road.

When, therefore, a lateral branch railroad, or a shipper thereon, seeks to enforce a statutory right to a connection with another railroad, neither the lateral branch road nor the shipper comes before the Court in the same attitude and with the same equities in its favor as a shipper asking for a private side-track connection. The former would impose upon the carrier a burden not naturally belonging to it. The latter asserts a right which, while it may not exist at common law, is in line with the generally recognized obli-

gation of every carrier to provide adequate facilities for its own shippers without discrimination. The former's right to a connection is subordinate to the interests of the carrier's own patrons. The latter's right is merely that which the carrier owes to every shipper along its road without discrimination.

It seems evident, then, that when a connection between two railroads is sought in the interest of one of those roads or the shippers along its line, the test to be applied in determining the justification for the connection should be broader and more liberal to the carrier with which the connection is sought than in the case of an application for a private side-track connection.

The revenue to be derived from the connection and its relation to the expense and inconvenience to the carrier involved therein are not the only points to be considered. The interests of the carrier upon which the burden is sought to be placed, ought fairly and reasonably to be considered. What effect will such a connection have upon its business, its development, and its ability to handle not only the traffic which the connection will give to it but its own traffic as well?

The interests of the patrons along the carrier's road, to properly and adequately serve whom is the carrier's primary and most important duty, must enter into the question. Will the service which the carrier is giving them be adversely affected by the connection? Will they be subjected to disadvantages and inconveniences which will outweigh the benefits to be derived from the connection by the lateral branch road or the shippers along that branch road? To what degree are the shippers along the road seeking the connection de-

pendent thereon for an outlet to the various parts of the country? Have they already reasonably adequate connections with other trunk lines? Is the connection sought merely as a convenience, or as a necessity?

All these questions we submit were necessarily involved in a fair and proper consideration of whether the connection in this case would be justified.

In Wis. M. & P. R. R. Co. vs. Jacobson, 179 U. S., 288, this Court was called upon to review the judgment of the Supreme Court of Minnesota affirming a judgment of the District Court, directing the plaintiff-in-error to make a track connection with another railroad. The right to the connection was asserted under a statute of the State of Minnesota. This Court affirmed the judgment of the Supreme Court of Minnesota, ordering the track connection to be made. We quote from the opinion:

> "Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be,

whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity or the reverse, of legislative action.

We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the plaintiff in error. * * *

In this case the provision is a manifestly reasonable one, tending directly to the accommodation of the public, and in a manner not substantially or unreasonably detrimental to the ultimate interests of the corporation itself."

The Commission, however, after stating in its opinion that "the law does not confer upon this Commission plenary discretion as to the advisability of such connection," adopted as a test for determining the justification of the connection the same test it would apply in the case of an application by a shipper for a private side-track connection. The clause provides only that the Commission *may* make an order. It must be held, therefore, to have excluded from its consideration all the facts relating to those questions which, as we have pointed out, are necessarily involved in the broad question of the justification for a connection sought by a lateral branch road or a shipper on such road, but which are not necessarily important or material in the case of an application by a shipper for a private side-track connection.

Those facts which we contend the Commission disregarded, and which were essential to a fair and proper determination of the questions at issue be-

fore the Commission are fully set forth in the bill at pages 3-10 and in the moving affidavits, pages 29-40.

All these facts are admitted for the purposes of this appeal. They were presented to the Commission, and the Commission, as clearly appears from the opinion of Commissioner Lane, felt constrained to disregard them in determining whether the amount of traffic to be derived by the appellee from the proposed connection would justify the construction and maintenance thereof.

We think the Commission might properly have found, upon a consideration of these facts, that the policy which the appellee has adopted with respect to the operation of the Morris and Essex Railroad, the building up of the suburban traffic along that road, and the discouraging and restricting of freight traffic thereon, is entirely justified. The appellee is placed in a peculiar position with regard to the operation of that road. Little freight traffic moves to or from points thereon, and that little is confined largely to commodities which are necessaries of life, consumed by residents of the territory served. The patrons of the road are almost exclusively passengers, and of these the great majority are commuters, business men, traveling to and from business in New York City. The natural demand of its patrons, therefore, is for improvement of its passenger service. On the other hand, the shippers of freight along the road are so few and their shipments so small in amount that their interests are scarcely to be considered in the operation of the road. We do not mean to say that the appellee has not provided and does not propose to provide in the future, adequate freight facilities for such

shippers. The point we desire to make is, that the shippers themselves do not require or desire any greater freight facilities than the appellee now provides, and those facilities are limited to the operation of one freight train per day and one at night each way. The appellee has, therefore, adopted the policy above outlined, not only in its own interest, but also in the interest of its patrons. It hopes thereby to give them the best suburban service in and out of New York City. It proposes thereby to meet the demands and satisfy the needs of all its patrons. And its policy has met with their universal approval. So long then as this policy is satisfactory to the patrons of the road, in fact, is demanded by them, and so long as it does not prejudice shippers located along the line of the road, it would seem not only the privilege but the positive duty of the appellee to adopt and promote it.

The effect which a connection with the Rahway Valley Railroad at Summit will have upon the continuance of this policy and the maintenance of the high standard of suburban passenger service which the appellee has provided, and hopes to provide for its patrons in the future, must be evident. It is not to be judged simply from the amount of freight which the Rahway Valley Railroad is prepared to tender to the appellee at the present time, namely, fifty carloads a year. The more important point to be considered is the development of that railroad in the future. If the proposed connection is made the appellee will be obliged to receive and handle all freight tendered to it by the Rahway Valley Railroad. It will have no influence over or control of the location of industries along the line of that road as it has

with respect to its own road. While it might discourage the location of a new industry along and in connection with its road, that same industry might be persuaded by the Rahway Valley Railroad Company, by the promise of connections with the appellee's road, to locate along the line of the Rahway Valley Railroad. Certainly the policy of the latter road will be to encourage the location of industries thereon. And with connections with three trunk lines, and enjoying the New York rate with each of them, it might well succeed in building up a large freight traffic. Looking to the future as well as to the present, we believe this connection would result in the complete overthrow of the policy above outlined, and the serious crippling of the splendid suburban service which the appellee is striving to give its patrons and which is absolutely essential to their welfare.

On the other hand, the advantages that the shippers along the Rahway Valley Railroad would derive from the proposed connection are slight. The shippers are few in number and the amount of their shipments is small. At the present time they enjoy connections with two trunk lines, the Central Railroad of New Jersey and the Lehigh Valley Railroad, both of which roads have connections with the appellee's road in the State of New Jersey. They are able to reach, via their present connections, every point that they could reach through a connection with appellee's railroad.

In view of all these facts, we submit that the Commission erred in deciding the question of the justification for the proposed connection, upon the same principles as it would decide a similar ques-

tion in the case of an application by a single industry for a private side-track connection. In the latter case the interests of the railroad itself and of its other patrons could not well be considered, because the applicant would only be asserting a right common to all shippers along the road. In the present case, however, the interests of the road seeking the connection must be set off against the interests of the other road and the patrons thereof, and if the advantages to be gained from the proposed connection by the former are outweighed by the disadvantages resulting therefrom to the latter, we believe it must necessarily follow that the connection is unjustifiable.

What the Commission's decision might have been had it considered all the facts which we have herinbefore set forth, we cannot say. Clearly, however, it excluded from its consideration material facts bearing on the question at issue, which had they been considered under a proper construction of the statute, might well have persuaded the Commission to a different conclusion than it reached in this case.

In closing, we beg to state that in our view this appeal is to an extent academic.

The real party in interest, the Rahway Company, did not appeal.

The only considerable shipper on the line of the Rahway Company, the American Circular Loom Co., after the decision below, commenced a proceeding before the Commission for the relief here sought, as a shipper under the clause. That proceeding, however, was not pressed and at the third hearing at New York before Special Examiner Smith, on February 3d, 1910, was

dismissed for want of prosecution. The Company was not represented.

It is apparent that there exists no real demand by any shipper for the connection, and we are led to assume that this appeal is pressed because the Commission desires the clause construed by the Court as a precedent in other cases.

## POINT IV.

**The decree of the Court below, granting an injunction pendente lite, restraining the enforcement of the order of the Interstate Commerce Commission, should be affirmed.**

Respectfully submitted,

WILLIAM S. JENNEY,

Attorney and Counsel for Appellee.